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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 684

BELLE MARACHOWSKY, ETC.,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Belle Marachowsky, prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on January 7, 1953, affirming on all counts but one the judgment of the United States District Court for the Western District of Wisconsin.

Opinions Below

The trial court filed no opinion. The opinion of the Court of Appeals (CAR 12) is reported at 201 F. 2d 5.

It is reprinted in the Appendix to this Petition.[1]

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on January 7, 1953 (CAR 12). Petition for rehearing was timely filed on January 22, 1953 (CAR 15) and denied by order entered February 6, 1953 (CAR 17). On February 28, 1953, Mr. Justice Minton entered order extending time for filing petition for writ of certiorari until March 28, 1953. The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1). See also Rule 37(b) of the Federal Rules of Criminal Procedure, promulgated February 8, 1946.

Questions Presented

1. Whether as a matter of law Petitioner was deprived of her right to fair trial by refusal of the trial court to instruct the jury on the theory of her defense:

> "Unless the Government has proved to your satisfaction beyond a reasonable doubt that the said written contract was not made in good faith and as part of a fraudulent scheme, then you are instructed that Belle Marachowsky had a right to rely upon the said contract; present her claims and attempt to recover what she believed she had coming from the transactions arising out of or described in said contract."

2. Whether summaries of books and records prepared by a Government accounting expert and purporting to show

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[1] Because the typewritten record was dispensed with in the Court below, this petition will refer to the record as:

"CR", the Common Law Record in the trial court.

"Tr.", the Transcript of the Testimony.

"CAR", the record of the supplemental proceedings in the Court of Appeals.

"App'x", the opinion of the Court of Appeals reprinted as an appendix to this petition.

that all credits and debits to several accounts as they appear in corporation books of original entry were actually all to the single account of one individual are admissible in evidence where it appears that they were based on an unauthenticated undated carbon memorandum of account as to which there was no showing that it was made in the regular course of business or contemporaneously and where books of account of the corporation pertinent to the conclusion in the summaries were neither consulted nor made available in court at any time.

Statutes Involved

Title 18, U.S.C., provides:

> "Sec. 152. * * * Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or
>
> "Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt * * * shall be fined not more than $5,000 or imprisoned not more than five years or both."
>
> "Sec. 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both."

Title 28, U.S.C. Sec. 1732(a) provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was

the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. * * *"

Statement

Petitioner, Belle Marachowsky, with J. H. (Jake) Marachowsky, was named defendent in an indictment dated June 29, 1951, containing 14 substantive counts and one conspiracy count (CR. 9-27). Each of the first seven odd-numbered counts, 1, 3, 5, 7, 9, 11, 13, inclusive, alleged that she made oaths in the bankruptcy proceedings of the Portage Wholesale Company in support of her amended claim for $126,780 filed against that estate (CR. 9-27) and in violation of 18 U.S.C. Sec. 152. The first seven even-numbered counts, 2-14, inclusive, related to the co-defendant, Jake Marachowsky. The fifteenth count charged conspiracy by both to present a false claim against the debtor estate and to make false oaths in such proceedings in relation thereto (CR. 26-27).

Verdicts of guilty were returned against defendants on each count on which he or she was charged (Tr. 2881-2882). The petitioner, Belle Marachowsky, was given a general sentence of two years and $10,000 fine (Tr. 2903-2904). Co-defendant, Jake Marachowsky, on each of the substantive counts against him was sentenced to five years and on the conspiracy count to two years, all sentences to run concurrently, and on counts 2, 4, 6, 8 and 10 to pay fines of $5,000 each. (Tr. 2901-2903)

On appeal the Court of Appeals affirmed except that as to count 13 against petitioner, it held the evidence insufficient as a matter of law[2] (CAR 13) (App'x. 16). In all other

[2] Count 13 alleged falsity in Belle's statement that a remittance received by the company from one Blumberg was for a car of corn purchased from her, whereas in fact it was allegedly remitted by Blumberg on behalf of

respects the judgments of the trial court were affirmed (CAR 13).

PETITIONER SEEKS NO REVIEW OF FACTS.—Petitioner, Belle Marachowsky, does not here seek review of the facts upon which the jury returned its verdict in this case.

She contends that the decision of the Court of Appeals in affirming rulings of the trial judge with respect to the questions hereinabove presented involves errors of law requiring reversal by this Court.

The substantial nature of and the broad and decisive effect with respect to all counts of the errors of law relied upon is apparent from a brief review of the evidence and inferences therefrom most favorable to the Government's case and including those upon which the Court of Appeals apparently relied in reaching its decision:

Petitioner's maiden name was Belle Canel. At the beginning of the transactions here involved, it was Belle Blitz, she then being the wife of Joseph Blitz. She divorced him in October 1947 (Tr. 998, 1695). Subsequently, in October 1948, she married J. H. Marachowsky (known also as Jake Marachowsky) (Tr. 1434, 2228). She is referred to under each of these names in the record and transcript and in this Petition.

BANKRUPT'S BUSINESS.—The Portage Wholesale Company, the bankrupt, with principal place of business at Portage, Wisconsin, (Tr. 134) was, in the period 1944-1947, a corporation engaged in the sale at wholesale of food products. It was owned principally by J. H. Marachowsky and his

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Abramson to discharge the latter's obligation to Portage Warehouse.

But the court of appeals held the evidence insufficient to sustain the verdict because (1) there was no direct testimony by Blumberg that he did not remit the money to Belle—a charge not made in the court; (2) evidence as to transactions and deals between Blumberg and Abramson, Abramson, Belle and Jake were all uncertain and conjectural (App'x. pp. 14-15).

brother, Jule Marachowsky (Tr. 1448). J. H. Marachowsky owned the controlling interest (52% of the capital stock) (Tr. 1446-1447) and was President of the corporation (Tr. 1435). Jule Marachowsky was Secretary-Treasurer, and owned 47% of the stock (Tr. 1446). Between them, they transacted most of the corporation's business, with little regard to formality, it appearing that minutes of Board meetings, records of the corporation's operations and memoranda of the officers' policy decision were seldom if ever kept. (Tr. 1448, 1462-1463).

Aside from its local wholesale business in Portage, Wisconsin, the corporation conducted a brokerage business in a variety of food products, buying and selling, among other things, butter, cheese, corn, syrup and dextrose; these operations extending from purchases in Omaha, Nebraska, to sales in Worcester, Massachusetts [3] (Tr. 1052, 1101, 1150, 2167-2168).

In December 1944, petitioner, Belle Blitz, and her husband, Joe Blitz, came to Portage, Wisconsin from Chippewa Falls (Tr. 1696, 1697). Joe was employed by Portage Wholesale Company and shortly thereafter became the company's eastern agent in its "outside" operations, making his headquarters at Room 531, Pennsylvania Hotel in New York City (Tr. 996, 1042-1043). He continued as such during 1945 and the greater part of 1946, while also accepting commissions from other concerns (See Ex. 134, books of Can-Meat Corporation, Tr. 996) with whom he dealt on behalf of Portage. His duties were to sell corn, dextrose, butter and other products shipped to New York by or at the request of Portage Wholesale Company (Tr. 996). He testified that he received his orders from Jake Marachowsky by phone or typewritten note (Tr. 1051, 1099), and regarded himself as working for "Portage Wholesale Co. and Jake Marachowsky".

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[3] In the transcript and on the books of the corporation these are referred to as "outside" operations to distinguish them from purely local transactions.

In most cases the products were shipped in carload lots from the west and Joe was given information on the car number, its contents and arrival date with orders to sell to customers in the New York City area (Tr. 1003). If the shipment was on an open bill of lading consigned to him, he delivered the bill of lading to his purchasers (Tr. 996, 1003). When the shipment was covered by bank draft with bill of lading attached, he sometimes paid the draft at the receiving bank with cash and then sold the car (Tr. 1003). All of his receipts were in cash[4] (Tr. 997), although in some of the transactions here involved remittances by check were made by the purchaser to Portage Wholesale Company. His cash receipts, less his expenses, were transmitted to the company (Tr. 1001). He testified that his practice was to place currency in envelopes in a suitcase which was carried back to Portage (Tr. 999, 1078, 1100-1101). He estimated his receipts as "over two million" (Tr. 1049, 1078). However, the company's Cash Receipts book and general ledger sales control account fail to reflect any such amount (Exs. 50, 373).

The company also had agents purchasing food products in Iowa and Nebraska. One of these, John Olson, made purchases either with cash or by company check. It was the practice to have blank checks issued him signed by defendant, Jake Marachowsky. Then, at the time of purchase he would fill in the payee and the purchase price. (Tr. 254, 256-257, 2175-2176).

On June 30, 1946, price ceilings were removed from all commodities. They were re-established on some prod-

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[4] It appears that many of the dealings involved were violations of the regulations of the Office of Price Administration. The indictment does not, however, charge petitioners with violating the applicable price ceilings in these transactions and, indeed, the Government's case was predicated primarily upon the testimony of persons with whom the defendants and Portage dealt in these over-ceiling transactions.

ucts on July 25, 1946, including corn syrup and dextrose but not on other products, including corn and cheese. Price ceilings were removed finally on September 18, 1946, from all products. But Joe Blitz insisted all his sales were black market operations (Tr. 1051).

BANKRUPTCY PROCEEDINGS.—After the removal of price ceilings in September, 1946, the "outside" business of the company began to fall off. Bank statements of the company reveal that in the fall months of 1946, its account was frequently overdrawn. (Ex. 48, C, D, E) In December, Jake Marachowsky resigned as president (Tr. 225, 227). On January 21, 1947, the company filed a petition for an arrangement with its creditors under Chapter XI of the Bankruptcy Act, 11 U.S.C., c. XI (Tr. 17). The matter was referred to Miles C. Riley, Referee in Bankruptcy (Tr. 16, 19).

Belle filed claim for $67,926.06 August 28, 1947, (Ex. 4, Tr. 25) and particulars of claim on October 20, 1947 (Ex. 5, Tr. 26). Her amended proof of claim for $126,780.09 was filed June 11, 1948 (Ex. 6; Tr. 26, 36).

Adverse examination of Belle and J. H. Marachowsky before the Referee were held March 22, 1948 (Tr. 28, 39; Ex. 10).

Testimony on behalf of claimant Belle was taken before the Referee in proceedings July 12, 14, 15, 16 (Ex. 7-10), July 28 and August 12 and 13 (Ex. 9; Tr. 27, 40-41). Her claim was disallowed (Tr. 42).

Portions of the testimony given by Belle and Jake in this proceeding constitute the testimony and oaths that are charged in the substantive counts of the indictment to have been wilfully and knowingly false. The same portions of the testimony are the only overt acts alleged in the conspiracy count (CR 26-27).

In the proceeding before the referee Belle Blitz based her claim on a written agreement dated July 22, 1946,

and signed by J. H. Marachowsky for the Portage Wholesale Company and by her (Ex. No. 322):

"PORTAGE WHOLESALE COMPANY

Portage, Wisconsin

Memo—Agreement July 22, 1946

(1) The P.W. Co. agrees to pay to Belle Blitz on demand all monies it receives or will receive from credits by the H. S. Bank from accts. of Belle Blitz including Robinson, Brockelman, Sims also Rose, Fogee, John Olson—Ferguson and Food Fair and others.

(2) Such monies are due and owing to Belle Blitz—less charges as agreed.

(3) The purchases of corn by Belle Blitz hereby acknowledged totals 121 cars at $1.31 per bushel.

(4) All sales of corn and corn products shall be for the acct. of Belle Blitz—her deal—The P.W. Co. has no investment and won't—all gains or losses are hers except on accounts excepted.

(5) Furthermore the P.W.C. agrees to pay to Belle Blitz the difference between market price and $1.31 on 121 cars corn in event it takes delivery of all or any of the 2,000,000 lbs. corn products contracted in her behalf, which contract is hereby admitted is hers.

(6) This agreement includes all transactions made by J. H. Marachowsky in behalf of Belle Blitz—but does not include dairy products just dealings on future to Hygrade Foods or any transactions with Sol Abramson.

(7) This contract and agreement can be terminated by either party at any time but continues until cancelled.

Signed J. H. MARACHOWSKY
Portage Wholesale Co.
Signed BELLE BLITZ

Witness
SI KRUEGER"

Belle further relied upon invoices (Exs. 11-16) dated in July and August of 1946 debiting the Portage Wholesale Company for income items received by it and bearing also the signature of J. H. Marachowsky for the Portage Wholesale Company acknowledging that the items were due and payable by the corporation to her.

BOOKKEEPING SYSTEM.—The Government for corroboration of the single witness available as to the false swearing charged in each of the several counts, and to sustain its burden of proof, relied heavily upon accounting records and summaries despite the fact that the books and records of the bankrupt corporation were admittedly inaccurate and incomplete (Tr. 385, 416, 417, 425, 428, 430, 435).

The books and records of the bankrupt comprised the following:

To record liabilities and their payment:

1. Invoice files, paid and unpaid (Tr. 231-32, 1352, 1400-1401, 1543).

2. Punched IBM cards. One card coded and detailed by name and amount, a credit to accounts payable and also the debit to the proper merchandise or expense account arising from receipt of an invoice. This card was based on a voucher attached to the invoice and prepared by the accounts payable bookkeeper (Tr. 231-232, 263).

3. Invoice register (Ex. 47; Tr. 231, 1543). The invoice register in the IBM system consisted of a binder of cards or sheets printed daily by running the punched IBM cards through the machine. It listed invoices for merchandise purchases and other items that had been vouchered but not paid for (Tr. 264, 460, 1544). Each invoice was approved by J. H. Marachowsky or his brother, Jule, or in some instances by one Gassman (Tr. 249).

4. Distribution journal (Ex. 48) was printed on the IBM machine from the total day's transactions after all the IBM cards had been run through the machine and the totals of the amounts so distributable to the

several purchase and expense accounts had been determined on the machine (Tr. 264).

5. Punched IBM cards for payments. One card coded and detailed the date, name of payee, and amount of each check and the debit to accounts payable and the credit to the particular bank on which it was drawn: Home Savings Bank of Milwaukee or City Bank of Portage (Tr. 232, 263). Thus the balance of any individual account at any particular time could be obtained by running the IBM cards for credits and debits through the machine for tabulation (Tr. 249, 477, 1544).

6. A check register for accounts payable for merchandise, one for each of the two banks showing the invoice for which each check was issued. This was printed automatically on the IBM machine (Tr. 1375-1377) when the IBM card for each payment was run through the machine. The total of the cards for a particular day was a debit to the accounts payable control (Ex. 208; Tr. 209, 263, 1372, 1373, 1681). The check register was also used to list counter-checks (Tr. 1389).

7. Yellow duplicate of each original check and of the remittance notice attached to each, all retained in a post binder (Tr. 1343, 1346). A third copy—a pink triplicate was attached to the invoice to which it was related, and filed with it (Tr. 1342, 1553).

8. Accounts payable vouchers. These were white slips attached to the pink triplicate of the check and also showed for what the payments were made (Tr. 1336, 1548).

To record sales and income:

1. Sales invoice usually issued in nine copies for carload lot sales (Tr. 1358-1361).

2. Sales journal. The total of the sales invoice for a particular day was recorded in the sales journal (Tr. 274); copies of the invoices for a particular day were bundled together and thereafter referred to as an invoice or net sales group (Tr. 276).

3. Cash receipts book (Ex. 50). In pen and ink recording credits based on incoming checks or cash (Tr.

1235) and showing from whom the payment was received (Tr. 1236).

4. Accounts receivable ledger which consists of individual detail sheets printed on a Burroughs bookkeeping machine and containing amounts of debit, entered from invoices and showing invoice numbers. Credits thereon were entered from the cash receipts book. Debits were to the bank and credits were to Accounts Receivable of Portage Wholesale Company or to its Outside Receivables (Tr. 1236). The detail work was in agreement with the general ledger (Tr. 231).

And:

1. General journal, to record monthly closing entries and adjustments. (Ex. 373; Tr. 231) It is necessary to examine the general journal wherever there are indications of adjustments to determine the disposition of the item (Tr. 2786-2788).

2. General ledger containing control accounts on all expense and sales items (Ex. 373). This ledger was closed monthly by balancing and checking with the detail books (Tr. 231).

THE COUNTS OF THE INDICTMENT AND EVIDENCE THEREON.—Peculiarly enough the Government did not directly charge that the contract or invoices were false although the testimony of some witnesses tends to question their authenticity. Each count against Belle dealt with a specific receipt of money by the company in connection with a transaction in which Belle claimed that she had an interest such as to make the receipt of the money give rise to an obligation on the part of the company to pay it to her.

Figge Transaction

COUNT I

The first count of the indictment charged Belle with having testified falsely regarding an item of $20,000 in her claim: That she had contacted one, Figge, in Omaha on several occasions and asked him if he would be able to procure

corn for her; that he told her he would but would need an advance of cash and it would cost $100 per car to procure it; that a $33,000 or $32,999.17 credit that came into the company was money which had been given him by her and by Olson (CR. 10).

Figge denied that Belle had ever given him any money (Tr. 166-167, 171-172).

John Olson, Portage's commission purchasing agent during 1946, met Frank Figge about March 1946 in Omaha (Tr. 140) and arranged to purchase butter from him on the Portage account (Tr. 141). Figge owned the West Point Creamery in West Point, Nebraska (Tr. 141) and told Olson he was at the time "short on capital to operate both plants" (i.e., West Point and Kegley Creamery at Sioux City, which he had personally sold but took back in April) (Tr. 140-142), and they agreed that Olson would advance him money to "operate again" and he would sell Portage Wholesale Company the butter (Tr. 142).

Through Figge, the Government introduced cancelled checks of the bankrupt totalling $99,000 issued between June 11 and July 9, 1946, payable to Kegley Creamery (Ex. 17-26; Tr. 144-147).

Figge testified that Olson for Portage Wholesale Company informed him on July 11, 1946, that the Company would buy no more butter, would like to settle up and that it had a balance of exactly $33,000 which Figge verified with his bookkeeper (Tr. 156) and paid first by check and then, on insistence of Olson, by wire to Home Saving Bank, Milwaukee (Tr. 157-159). The Cash Receipts Book of Portage (Ex. 50) shows that the credit ten days later, July 25, in the amount of $32,999.17 was made to "Farmers Equity Cooperative Creamery Ass'n.", with which Figge had no relation. The Accounts Receivable ledger sheet also shows a credit to that firm of $32,999.17 and a credit balance in the same amount (Tr. 271).

Figge testified that an examination of his records re-

vealed that the $33,000 balance was correct but the fragmentary portion of his records he produced at the trial [5] showed in fact that a balancing entry in excess of $54,000 was made in the ledger not before but after the payment of the $33,000 (Tr. 154-155, 162; Ex. 111):

July 10, 1946	$1,750.00
July 6, 1946	9,821.31
July 31, 1946	33,000.00
July 31, 1946	54,812.79
	$99,384.10

He explained that the first two items and the $54,812.79 item, all three, represented butter shipped (Tr. 155), a total of $66,000.00. Yet his Journal at p. 253 (Ex. 112), shows the Portage Wholesale Account Receivable on account of sales of butter for the full month of July at only $54,812.79 (Tr. 163-164), as against the ledger entries totalling $66,384.10, supra. Figge's books thus did not substantiate him.

There were no records of Portage Wholesale to show how much merchandise Kegley Creamery or any other creamery related to it had actually shipped (Tr. 411-412). There were no invoices supporting any payment to Kegley Creamery (Tr. 417).

Evidences of numerous other earlier checks (April 8-June 15, 1946) to Figge on his West Point Creamery totalling some $48,000 were read into the record (Tr. 1553-1559).

Price, the F.B.I. expert accounting witness, admitted there were no Portage Wholesale records to show how much merchandise Portage Wholesale actually received from Figge, doing business either as West Point or Kegley

[5] Figge testified that he didn't know what happened to the rest of his records (Tr. 177) and that no permanent records were in existence except the Ledger and Journal which appeared to be summaries only (Ex. 111, 112, 113).

Creamery Company and he could not tell whether Figge actually forwarded merchandise or not (Tr. 1627-1628).

Nevertheless, Price was permitted to give his opinion that the accounts payable vouchers—white slips attached to the company's copies of the cancelled checks— identified by Figge (Tr. 1548) showed that all of the $99,384.10 represented thereby was for "the purchase of butter" (Tr. 1549). This was over the repeated objections of the defendants addressed to lack of basis for his conclusion because of the inadequacy of the records (Tr. 1540, 1542, 1545, 1548).

The jury was thus led to infer that the $33,000 received by Portage was solely to settle the Kegley account to the exclusion of the other payments by Portage Wholesale to Figge or his West Point Creamery, and to the exclusion of monies asserted to have been paid him for the purchase of corn by Olson (Tr. 1484) and evidenced as in part having been wired to Olson by Mrs. Blitz (Tr. 2177-2180; Ex. 319, 324).

Spiritus Butter Transaction

COUNT III

Count III charged Belle with falsely identifying an invoice from her dated July 19, 1946, for $27,240.57 as being for currency personally paid by her at the request of Jake to one Milton Spiritus as an advance to take up a sight draft for a car of butter shipped to New York, and falsely testifying that this remittance was to be credited to her.

The most notable point on this count is that the Government concededly failed to show that Belle had not advanced the money to pay for the car of cheese sold to Spiritus. It stipulated that there were no records of Portage to show that it paid for the car (Tr. 446-447, 1560). The evidence was clear that Spiritus, to whom it was sold, did not pay the draft (Tr. 518-519, 524, 535). There was no contention

that Joe Blitz paid it. Yet the Government stipulated that the draft of the shipper, Farmer Equity Creamery, $26,-856.90 was paid (Tr. 522, 1560).

To sustain its burden the Government relied on a stipulation that Car No. SFRD 18,500 containing butter was shipped from Farmers Equity Creamer, Orleans, Nebraska, on July 9, 1946. It was billed to Joe Blitz, Room 531, Pennsylvania Hotel, New York City. A draft in the amount of $26,856.90 was drawn on Portage Wholesale, care of Joe Blitz (Tr. 534) and was collected by Central Hanover Bank & Trust Co. (Tr. 522). But Spiritus received an invoice from the Company for the car in the amount of $27,240.57 (Ex. 114) and mailed his check for that amount to Portage (Ex. 116; Tr. 363). On the books of the Company his remittance was credited to him (Ex. 52, A, B, C). Spiritus had ordered the car from Portage Wholesale (Tr. 363, 367) and Joe Blitz, he thought, brought him notification of shipment (Tr. 353). He denied any dealing with Belle on the car (Tr. 359-360), or that she gave him money to pick up the draft (Tr. 504). But he didn't know who brought him the bill of lading (Tr. 525).

Thus, while Spiritus denied Belle had given him cash and although the invoice by Belle on what she relied showed $27,240.57 whereas the draft was only for $26,856.90, the Government failed completely to show that anyone other than Belle had paid the draft.

Spiritus Cheese Transaction

Count V

The fifth count charged Belle with falsely testifying that she had furnished $11,147 and some odd cents to enable Spiritus to pay a draft covering a car of Edam cheese (CR. 15).

The Government's evidence tended to show this Car MDT

21947, containing Edam cheese and invoiced to North Egg Company, care of Joe Blitz was shipped from Almena, Wisconsin, on July 16, 1946 (Ex. 117, Tr. 1565). The company borrowed $11,147.21 on the security of its sight draft on North Egg Co., care of Joe Blitz, secured by bill of lading on the car (Ex. 118; Tr. 1566). Joe Blitz couldn't sell the car but testified he thought he "gave Milton (Spiritus) the money, I guess, or somebody," (Tr. 1004). Spiritus testified that from an entry on his books, "J. Blitz", July 24, 1946, not personally made, he believed Joe Blitz furnished the money for the draft (Tr. 371-376, 568-9), although Spiritus' check was used (Ex. 119). Joe said he thought he had supplied "over $10,000" to Spiritus from black market sources (Tr. 1081-82), although there were no ceilings at that time.

Spiritus issued his check for $10,000 to Portage Wholesale (Ex. 122, Tr. 579). The company credited the payment to Spiritus (Ex. 52, A, B, C.) The Home Savings Bank under date July 26, credited the company with the same amount and debited the company for $11,160.20 (Tr. 1566-67).

The elaborate summary prepared by the Government's expert witness, Price, (Ex. 317) shows this transaction as a debit and credit to North Egg Co., % Joe Blitz at $11,147.21 with no increase for commissions.

Brockelman Brothers Transaction

COUNT VII

The seventh count charged Belle with falsely testifying that a Mr. Harry H. Robinson had bought from her for Brockelman Brothers of Worcester, Massachusetts, 3 cars of syrup and dextrose manufactured by American Maize Co. at a price of $26,179 with a further agreement to pay her the difference between the market price of the equivalent

corn and the actual price she paid for corn required by the manufacturer (CR. 17-19).[6]

The evidence showed the 3 cars were shipped by American Maize to Portage Wholesale on arrival draft, and paid for by Portage at City Bank of Portage on September 9, 1946 (Tr. 1435, 1440, 1442). The cars were shipped to Brockelman Brothers (Exhibits 69, 70 and 71). They were invoiced on September 17 to Joe Blitz for $12,336.26 (Ex. 68; Tr. 1577). Portage Wholesale wired Brockelman Brothers confirming the shipment and asking advance of $26,000 (Ex. 171, Tr. 1135). Brockelman delivered its check to the Mechanics National Bank of Worcester and the bank wired $26,179 to Milwaukee for the account of Portage (Ex. 172, Tr. 1138-1139). The amount exactly equalled the amount shown on a plain invoice, not Portage letterhead, later received by Brockelman (Ex. 164; Tr. 1135-1137, 1216-1217).

This amount was recorded on the Cash Receipts Book of Portage Wholesale Company as a credit to "Blitz Products Company." (Ex. 50; Tr. 1577).

Robinson testified he had no acquaintance with Belle and bought no merchandise from her (Tr. 1133-4, 1146) but he wasn't sure with whom he talked at Portage when ordering the dextrose and syrup on the phone (Tr. 1210), but in 1948, by deposition, he stated he had not dealt with Portage but had been left by the Marachowskys to an "associate" (Tr. 1220-1221).

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[6] In the period of controlled syrup and dextrose prices the free market on corn rose to a level which made it impossible for refiners to operate profitably by purchasing their own corn. Consequently, they required customers to furnish corn; six cars of which entitled the customer to purchase one car of dextrose or two of corn syrup (Tr. 2358-9). Portage Wholesale Company through Olson and other commission agents, produced corn in Iowa and Nebraska which was shipped to American Maize Company (Tr. 1504, 2204, 2215). The agreed dextrose or syrup was then shipped to Portage or to its order (Tr. 1568-1578).

Belle relied on: (a) Exhibit 322 dated July 22, 1946, which stated that all credits to Portage Wholesale from this transaction should be hers; (b) The fact that the invoice to Brockelman was not a Portage Wholesale invoice; and (c) The fact that the payment was credited on the books of the company to Blitz Products Company.

Morrison Transaction

COUNT IX

The ninth count charged Belle with testifying falsely that she sold a tank car of syrup to William Morrison for $13,648 and that he wired the purchase price to Portage Wholesale Company (CR. 20-21).

The Government's evidence showed that the car of dextrose (GATX 24419) came to the company from American Maize on arrival draft paid by the company (Tr. 275, 329) in the amount of $5,140.61 (Tr. 1568). Morrison had telephoned Portage Wholesale Company to order the syrup (Tr. 709) and he denied that Mrs. Blitz had sold him the car (Tr. 713-714). But he could not recall to whom he talked (Tr. 724). He received no invoice for the car (Tr. 736-7) but on August 26, issued his check for $13,648 to pay the draft accompanying the bill of lading and his bank wired the money to Portage Wholesale (Tr. 710-711).

The Cash Receipts Book of the company (Ex. 50) showed a credit of this remittance to "Blitz Products Company".

Monarch Wine Transaction

COUNT XI

The eleventh count charged Belle with testifying falsely that she personally saw Jack Simms in New York, sold him a car of dextrose for $16,500, and had him send the money to Portage Wholesale Company (CR. 22-23).

The Government's evidence showed Samuel J. Sens of Lorain, Ohio, often known as Jack Sens, and whose name is frequently misspelled as Simms (Tr. 758). He ordered the car by phone and thought he talked to one of the Marachowskys (Tr. 759). He said he did not know Belle (Tr. 762).

The car, B&O 265,476, was shipped to New York on bill of lading showing Blitz Products Company as shipper and consignee, care of Joe Blitz and endorsed "Blitz Products Co., S. Krueger" (Ex. 326; Tr. 2456-2459).

William Morrison of Peak Products worked with Sens and sold this car to Monarch Wine Company which paid the draft of Home Savings Bank drawn on Peak Products Co. in the amount of $16,515 on September 11, 1946 (Tr. 347, 714).

The car was invoiced to Joe Blitz Corn Account in one of the sales invoices of the company at $7,735.32 (Ex. 83; Tr. 717).

The Portage Wholesale Company borrowed $16,500 from the Home Savings Bank on this car on August 28, 1946. This was entered as a credit to "Blitz Products Company" in the Cash Receipts Book (Ex. 50, p. 26).

Blumberg Wine Transfer

COUNT XIII

The Court of Appeals held the evidence on this count inadequate as a matter of law and it need not be discussed.

Conspiracy

COUNT XV

This count in substance charged that Belle and Jake conspired together to present a false claim for proof against the bankrupt estate and to make false oaths in relation

to that claim. The subject matter of the substantive counts were charged as overt acts (CR. 26-27). The Government relied on the evidence with respect to the substantive counts.

1. Generally, with respect to all the counts, the Government, to support its case, relied heavily on Belle's prior inconsistent acts:

That on January 16, 1947, she had sued the company for $36,000 allegedly lent between September 1, 1946, and November 30, 1946 (Ex. 179; Tr. 1445).

That on August 28, 1947, she filed a claim in the bankruptcy proceeding for $67,926.06 (Ex. 4) and on October 20, filed bill of particulars verifying that no note or other written evidence existed to support her claim (Ex. 5).

That on March 22, 1948, for the first time she presented a series of carbon copies of invoices (Exs. 11-16) partly in her handwriting, partly in Jake's, dated in the summer of 1946, before the $36,000 suit and the original claim of $67,926.06.[7]

2. Summaries and expert opinion of the Government's accounting witness.

Auditors retained by the receiver had prepared a report for the year ended May 31, 1947 (Ex. 205) which included in the Accounts Receivable the following items (Schedule A6):

"Blitz Products Company"	(credit balance)	$127,602.80
"Joe Blitz"	(debit balance)	30,196.23
"Joe Blitz Corn Account"	(debit balance)	114,935.47

[7] Belle explained that the suit was limited to two checks with the suggestion of her lawyers that the other claims would then be settled (Tr. 1839), that she did originally file claim for only $67,000 because Sol and Jake Marachowsky had informed her that certain other creditors were limiting their claims so that the company could work out an arrangement, but just before expiration of time for filing claim she discovered that the other creditors had filed their claims in full and so amended hers to the full amount (Tr. 1837).

These figures had been furnished to the auditors by the Government's own witness, Goetz (Tr. 400-401) who had been in charge of the bookkeeping for the company until October 1946 (Tr. 220, 222, 384-385). Goetz described the Accounts Receivable ledger sheets for these accounts as "missing" (Tr. 401).

The proceeds of the last three transactions claimed by Belle and questioned by the Government had been credited in the Cash Receipts book to "Blitz Products Company." These all involved the sale of corn products and fell within the scope of Paragraph 4 of her contract of July 22, 1946 (Ex. 322). Two of them, the transaction with Brockelman (Count VII) and that with Sims (Count XI) also fall within the scope of Paragraph 1 of the same contract (Ex. 322).

The Government was thus faced with these facts: that "an account showing a credit balance of $127,602.80" had been credited on the book of original entry of the corporation; that it was traceable, in part at least, to sales of corn products subsequent to the date of contract upon which Belle Marachowsky relied; and that there was no such company shown to exist.

To meet the adverse inference that this account might well represent the amounts claimed by Belle, the Government relied on what purports to be a two-page carbon copy of an account receivable statement of Portage Wholesale Company (Ex. 54-54A; Tr. 278) and offered in evidence as the account of Portage Wholesale with Joe Blitz (Tr. 508). There was no objection as to its admission "for what it shows," but there was no concession that it had any binding effect upon the defendants nor that it represented any particular account such as "Joe Blitz" (Tr. 508).

Starting with this Exhibit No. 54-54A, however, and treating it as if it had been admitted in evidence as a record of the corporation (Tr. 1566, 1570, 1575, 1577, 1580-92) the FBI accountant, Price, prepared a summary which pur-

ported to show that all items appearing in the Cash Receipts book as credits to the Blitz Products Company were in fact posted as credits to the individual account of "Joe Blitz" (Ex. 317; Tr. 1595).

He next testified to the preparation of, and introduced in evidence, another exhibit (Ex. 318; Tr. 1595) which, relying on the figures in Exhibit 317 and Exhibit 54 purports to show that the 3 accounts shown in the Cash Receipts book (Ex. 50) and the independent audits (Ex. 204-205) were all part of a single Joe Blitz account. Indeed, over objection he gave his oral opinion to the same effect (Tr. 1599). The summaries and opinion tended to destroy the evidential effect of the Blitz Products Company account as it appeared on the original books of entry of the corporation and the independent audits and so to destroy the confirming evidence that there was a balance of $127,602.80 owing to Belle when the company ceased doing business on January 22, 1947.

The foregoing statement briefly summarizes the facts upon which the court below relied in deciding that the evidence was properly presented to the jury.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In failing to hold that trial court erred in refusing that part of the sixth instruction which sought a charge that unless the Government established beyond reasonable doubt that the written contract of July 22, 1946 was not made in good faith, the defendant, Belle Marachowsky, had a right to rely upon it, present her claims and attempt to recover what she believed she had coming from the transactions arising out of or coming from the said contract.

2. In holding that all parts of the tendered instruction, other than the immaterial first sentence, had been fully covered.

3. In holding that the failure to give instruction on the defendant's theory of defense was entirely harmless.

4. In holding to be admissible in evidence accounting summaries prepared without reference to books and records of the corporation pertinent to the conclusions to which the summary is addressed.

5. In holding that the general journal of the corporation was made available to defendants before the conclusion of the trial.

Reasons for Granting the Writ

This application for writ of certiorari is filed because:

1. The court below has sanctioned a departure from the accepted and usual course of criminal trial in approving the refusal of the trial court to submit to the jury defendant's requested instruction on the theory of her defense.

2. The court below, in approving the admission in evidence of the written and oral summaries of the Government's accounting witness has given countenance to a practice that plainly deprives the defendant of her right to a fair trial.

1. The Refusal of the Trial Court of Defendant's Requested Instruction on Good Faith Deprived Her of Her Right to a Fair Trial.

Defendant's Sixth Requested Instruction requested the trial court to instruct the jury (CR 57):

> "It is immaterial whether the written contract Ex. 322 would be legally binding upon the Portage Wholesale Company in a civil suit. Unless the Government has proved to your satisfaction beyond a reasonable doubt that the said written contract was not made in good faith and as part of a fraudulent scheme, then you are instructed that Belle Marachowsky had a right

> to rely upon the said contract; present her claims and attempt to recover what she believed she had coming from the transactions arising out of or described in said contract."

The Court of Appeals held (App'x 19):

> We reach the same conclusion [no prejudicial error] as to the refused sixth instruction which sought a charge that it was immaterial whether a certain contract would have been binding in a civil case. All other parts of the tendered instruction had been fully covered. This specific postulate was, we think, wholly immaterial. There was no issue as to the binding effect of the contract, if it was genuine; to have given this instruction might well have confused the jury by injecting an immaterial issue for its consideration. At any rate, the refusal to give it was, we think, entirely harmless."

We concede that the first sentence of the requested instruction might be objectionable because confusing.

But even if this first sentence was objectionable, this did not affect the defendant's right to have the balance of the requested instruction or its fair equivalent, if sound in law and founded in evidence. *United States* v. *Villaroman*, 184 F. 2d 261, 263 (App. D.C., 1950); *United States* v. *Colbert*, 146 F. 2d 10 (App. D.C., 1944); *United States* v. *Hersh*, 68 F. 2d 799, 806 (C.C.A. 9, 1934); *United States* v. *Hargrove*, 67 F. 2d 820, 823 (C.C.A. 5, 1933).

Defendant's testimony was clear that as the result of a prior oral arrangement under which she bought dairy products for the Portage Wholesale Company, there arose in her favor an obligation on the part of the company to her (Tr. 1699-1704) that the Marachowskys, Jule and Jake, said they could not pay (Tr. 1704); that in lieu of payment she entered into a new oral agreement (Tr. 1705) reduced to writing in July, 1946 (Ex. 322; *supra*, p. 9;

Tr. 1705-1707) and that it was her understanding that the company would keep an account and that money that came into the company from her deals would be credited to her account (Tr. 1711). This agreement was really a main bulwark of her defense. As to the individual invoices that underlay her claims made the subject of the indictment, she testified that they were accurate statements of the account as she understood it at the date of the invoice to the best of her ability and knowledge (Tr. 1720, 1729-1731, 1736, 1748).

The statute, *supra*, p. 3, makes "knowingly and fraudulently" essential elements of the offense, and therefore requires a showing of the bad purpose or wrong intent implied in the word "willfully". *United States* v. *Wechsler*, 158 Fed. 579, 583 (C.C.A. 2, 1907); *In re Hale*, 206 Fed. 856, 857-858 (D.C. N.M., 1913). Indeed, each count of the indictment charges that defendant "testified wilfully and falsely, and knowingly and fraudulently made a false oath" (CR 9-27).

Since "good faith" was plainly a defense under the statute and since there was evidence upon which to base it, the defendant was plainly entitled to the instruction on good faith. *United States* v. *Hersh*, 68 F. 2d 799, 806 (C.C.A. 9, 1934); *United States* v. *Felton*, 96 U. S. 699, 702, 703 (1877).

In its emphasis on good faith and belief of the defendant, and in the light of the evidence, the requested instruction was certainly no more favorable to the defendant than the instruction held to have been improperly refused in *United States* v. *Murdock*, 290 U. S. 389, 393 (1933):

> "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you

> should consider that in determining whether or not his refusal to answer the questions was lawful".

As for the statement of the court of appeals that these parts of the tendered instruction had been fully covered, we can affirm that we have searched the instructions, and this court will, without being able to discover a single reference to good faith of the defendants.

The importance to the defendants of the requested instruction is obvious.

> "The respondents in a criminal case no less than parties in a civil case are entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules applicable to it." (*United States* v. *Hendrey*, 233 Fed. 5, 18 (C.C.A. 6, 1916)).

The necessity for strict observance of the requirement as an essential of fair trial has been repeatedly noted. *United States* v. *Murdock*, 290 U. S. 389, 396 (1933); *United States* v. *Bird*, 180 U. S. 356 (1900); *United States* v. *Jones*, 164 F. 2d 398, 400 (C.C.A. 5, 1947); *United States* v. *McAffee*, 105 F. 2d 21, 26 (App. D. C., 1939); *United States* v. *Hargrove*, 67 F. 2d 820, 823 (C.C.A. 5, 1933); *United States* v. *Calderon*, 279 Fed. 556 (C.C.A. 5, 1922).

The interposition of this Court's jurisdiction is plainly required to preserve in criminal cases the right to instructions that adequately submit to the jury the theory of, and rules of law applicable to, the defense presented by the evidence for the defendant.

2. The admission of the summaries and expert testimony of the Government witness price constituted highly prejudicial error.

Where a purported summary of accounts of a corporation and expert accounting opinion in derogation of books and

records of original entry of a corporation are based, as here, on inadmissible evidence and are prepared, as here, without reference to books and records pertinent to the conclusion to which the summary is addressed, not available for cross examination, such summary and opinion, no matter how narrow their scope, are not within the exception to the hearsay rule. The underlying principle and rule are stated in *Greenbaum* v. *United States,* 80 F. 2d 113, 121 (C.C.A. 9, 1935):

> "On the other hand, such intricacy and extent of detailed figures, massed in evidence against an accused man, place him in a perilous position. Experts differ on theories of accounting; they are not unknown to assume the functions of advocacy instead of detached analysis or statement; nor are they always free from error and mistake of fact and figuring as well as in theory. This implies no reflection on the expert in this case, but the human factor in experts' testimony requires that they shall not be permitted to bring into the case statements of their conclusions as to books not available for the purpose of cross-examining the experts as to such conclusions. Courts generally, and this court in particular, have been careful to lay down the protective requirements necessary to minimize the risk to the accused arising from such opinions of experts. In an opinion of Judge Rudkin, the court has stated the rule to be, where books of account are offered as evidence against one not a party chargeable with an interest in their keeping, that:
>
> " 'In order to lay the foundation for the admission of such evidence it must be shown that * * * the entries [in the books] were either original entries or the first permanent entries of the transactions.' *Osborne* v. *United States* (C.C.A.) 17 F. 2d 246, 248, cert. den. 274 U. S. 751."

As pointed out *supra,* p. 21, in the Cash Receipts book of the company covering the fiscal year beginning June 1, 1946, (Ex. 50) and in the invoices of the company there appeared entries which created a credit balance in favor

of Blitz Products Company in the amount of $127,602.80 (Tr. 41, 403). These were the records of original entry (Tr. 1612).

Obviously, the presence on the books of the company of this credit item in favor of Blitz Products Company, a creditor otherwise unidentified, would give good ground for the jury to believe that it indicated an obligation of the company to Belle Blitz in at least the amount of $126,780, which was the total amount of her claim.

Missing ledger sheets.—In 1948, Goetz had been in charge of the company's accounting with 6 or 7 bookkeepers under him, until about October 15, 1946 (Tr. 221, 222, 225, 384, 1221) and had returned in January 1947 (Tr. 225) to bring the records up to date for filing petition in the bankruptcy court (Tr. 227). He subsequently became receiver of the corporation (Tr. 229). The Accounts Receivable ledger of the company consisted of individual account sheets showing amounts of debit, credit and balance kept on the Burroughs machine and kept in a tray (Tr. 231, 237, 238). The total of these was in the general ledger (Tr. 231). There were some ledger sheets of "some Blitz accounts" and Sol Abramson that were missing (Tr. 385). After trying to check out the detail of the subsidiary ledger with the control account in the general ledger, he arrived at the conclusion that the missing sheets included a "Blitz Corn Account," "Joe Blitz Account," "Belle Blitz Account" and "Sol Abramson Account" (Tr. 385, 386). They had been missing since he took over in January 1947 (Tr. 482).

Reconstruction of Blitz Products Company ledger account from original records.—Independent auditors' reports for the year ended May 31, 1947, and May 31, 1948, were prepared by Wilbur S. Grant (Tr. 393-394; Ex. 204, 205) aided by Schoeneberg, a C.P.A. (Tr. 396). They were unable to bring the Accounts Receivable into agreement with the control account in the general ledger because of the

missing Accounts Receivable sheets (Tr. 398, 400-401). Goetz, at the request of Schoeneberg, reconstructed the accounts on the missing sheets (Tr. 401, 403) by paging through all of the invoices, one by one, and then by going to the Cash Receipts records (Tr. 403).

The invoices and the Cash Receipts record were the records of original entry (Tr. 1612). As a result of Goetz's work, the independent auditor's reports, Exs. 204 and 205, Schedule A6, showed "Accounts Receivable, Credit Balance, Blitz Products Company, $127,602.80" (Tr. 403, 457). The inference in favor of Belle's claim based on the books and records of original entry was thus strongly fortified by the work of Goetz and the independent auditors.

The detail of the process by which the prosecuting attorney and the expert witness, who had signed the complaint a ainst defendants (Tr. 1676) used purported summaries to contradict and nullify the only original or admissible records to which it relates is informative and worth at least a footnote in any commentary on the administration of justice. The summaries were based on Exhibit 54-54A.

EXHIBIT 54-54A WAS UNAUTHENTICATED.—This two-sheet statement (54A refers to the second page) was offered in evidence by the prosecuting attorney as an account of Portage Wholesale with Joe Blitz showing a credit of $11,-147.21 and a charge (Tr. 508). Counsel for defendants agreed it could be "admitted for what it shows" but denied binding effect on either of defendants and did not concede that it represented any particular account (Tr. 508).

Exhibit 54-54A had been previously identified by Goetz merely as a carbon copy of an Accounts Receivable sheet which served as the statement also to the customers of Joe Blitz, Chippewa Falls, Wisconsin (Tr. 278).[8] "If the customer wants the copy, he can " (Tr. 424).

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[8] Pages subsequent to 281 are erroneously numbered in the transcript as 272-281 and for clarity have been renumbered as 281A–281J, inclusive.

Exhibit 54-54A was in the proceedings before the Referee as Receiver's Exhibit 71-71A (Tr. 1316-1317, 1320). The prosecuting attorney stated (Tr. 1312):

> "The testimony on the prior hearing indicates that Exhibit 54, Mr. Blitz testified that he had had it in his possession and brought it for the purpose of that hearing, and the Government is willing to accept that statement as correct."

This reticence as to the exhibit is not strange. For the transcript of the testimony of Joe Blitz before the Referee, July 16, 1948, (Ex. 8) shows that Ex. 54-54A (then Receiver's Ex. 71-71A) was received by Joe Blitz not in the regular course of business but in an envelope from an unidentified sender about March 1948, more than a year after the receivership order of January 22, 1947,[9] and more

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[9] The testimony of Joe Blitz before the Referee was as follows (Ex. 8, pp. 739-741):

[739] "Q. Did you give Mr. Bennett [Counsel for the Receiver] 71 and 71-A

A. I did.

Q. And you have had that in your possession at all time, have you not?

[740] A. Well, I found it with some papers, and I brought it back to Portage, and someone sent this to me from Portage. I don't know, whoever it was.

Q. You are sure you didn't get this out of the Portage warehouse approximately at the time this went into receivership?

A. Positively not.

Q. Are you sure of that?

A. That is a known—that is a God's fact.

Q. So that you have had this item in your possession for—well, it must be over a year and a half, is that right?

A. Not true.

Q. Not true?

A. No.

Q. When was it sent to you?

A. Well, probably—well I will say three or four months ago.

Q. Three or four months ago?

A. Yes, someone sent that to me from Portage, I don't know who.

Q. Did it come in an envelope?

A. An envelope, yes.

Q. Was there any return address?

than 18 months after the last entry on Exhibit 54-54A.

Veronica Huschka, a bookkeeper who had kept the Cash Receipts book (Ex. 50; Tr. 243, 1234-1235), and had made entries in the Accounts Receivable ledger sheets (Tr. 1241-1242, 1244) did not know how Joe Blitz got Exhibit 54 (Tr. 1313) and testified that the ledger sheet had been missing out of the accounts of the Portage Wholesale Company records since the time the other account sheets were missing (Tr. 1318). They had never been able to discover any ledger sheets for any of the Blitz accounts from the beginning, in January 1947 (Tr. 482).

The record thus shows that Exhibit 54-54A was not found as part of the records of the company when it went into receivership in January 1947, but "turned up", as the Government stated in the court below, in an envelope mysteriously mailed by an unidentified sender to Joe Blitz, more than a year later, and about four months prior to the hearings in July of 1948. As to where it was for that year the record is silent.

EXHIBIT 54-54A WAS DISOWNED BY JOE BLITZ.—Joe Blitz, a Government witness, testified that he had no account with the Portage Wholesale Company (Tr. 1018), that there was no "Joe Blitz" account (Tr. 1055), no Blitz account (Tr.

A. No—I don't know. I don't remember if there was or not.

[741] Q. Any letter with it?

A. No, I don't remember if there was or not.

Referee: Did you send for it?

A. No, I didn't.

Q. Did you ask for it?

A. No, I didn't.

Mr. Boardman [Counsel for Claimant]: It was just sent to you?

A. That's right.

Q. But you don't know who sent it to you, or whether it came in an envelope with a return address or with a letter, or not, do you?

A. That's right.

Q. But at least you are the one who gave it to Mr. Bennett, is that right?

A. That's right.

1074); that he never did business as Blitz Products Company and was not "Blitz Products Company" (Tr. 1073) and that he had no "Blitz Corn" account (Tr. 1018, 1056, 1057).

The Exhibit 54-54A was on its face suspect. Joe Blitz went to New York to work for Portage Wholesale Company at least as early as the summer of 1945 (Tr. 1043, 1100) and Exhibit 54-54A shows three invoices debited to him as early as January 1945. Yet, between January 1945 and May 31, 1946, immediately preceding the fiscal period directly involved, the Exhibit 54-54A shows only one invoice debited to Joe Blitz and total debits of only $126.93.

Goetz, the company accounting officer, stated that he didn't know what was designated by the Joe Blitz account (Tr. 443) or the Blitz Products account (Tr. 441), and could never understand who was operating the various accounts—Blitz Corn, Blitz Cattle and Blitz Products—whether it was Joe or Belle (Tr. 441).

THE EXPERT'S SUMMARIES.—Nevertheless, the Government accounting expert, Price, was permitted to testify in detail how he had prepared his analysis or summary based on Exhibit 54 in great detail (Ex. 317; Tr. 1580-1595). Treating Exhibit 54-54A as a record of the Portage Wholesale Company (Tr. 1618, 1647, 1649, 1650, 1659) he purported to reconstruct Exhibit 54-54A (Tr. 1611-1612, 1658) using as a source only the sales invoices and the Cash Receipts book, the records of original entry (Tr. 1612). The exhibit purports to identify many of the debits and credits to Joe Blitz appearing in Exhibit 54-54A as being debits and credits in the books of original entry to Blitz Products Company and Blitz Corn Account (Tr. 1580-1595, 1611-1612, 1658).

On the basis of Exhibit 317 expert Price drew up a schedule (Ex. 318), in which he purports to reconcile Exhibit

54-54A, which shows a debit balance to Joe Blitz of $14,-032.12, with his Exhibit 317 which shows a debit balance to Joe Blitz of $30,196.23 and, as well, with the auditor's reports which showed the credit balance to Blitz Products Company of $127,602.80 (Tr. 1595-1598).

ORAL OPINION OF EXPERT.—Finally, on the basis of these analyses, he was permitted, over objection, to give his opinion that the company had treated the Joe Blitz account, Joe Blitz Corn account and Blitz Products Company account as one account, the Joe Blitz Account, Exhibit 54-54A. (Tr. 1599).

On cross-examination and before the admission of the exhibit, Price admitted with respect to the summaries:

(a) that Exhibit 54-54A was not found in the records of Portage Wholesale Company (Tr. 1604-1606, 1615);

(b) that his analysis disregarded the testimony of the Government's own witness, Joe Blitz, that he bought no goods from Portgage Wholesale (Tr. 1662), and that in an ordinary audit this would demonstrate that the charges to Joe Blitz "are not proper" (Tr. 1662);

(c) that many of the items treated as charges to Joe Blitz in his summary (Ex. 317) were the subject of duplicate invoices (Ex. 180) to Sol Abramson (Tr. 1610, 1666, 1668-1670) on the basis of which the Receiver had made claim for $100,000 against Abramson (Tr. 1607), and Price had not taken into consideration the question whether Abramson or Joe Blitz got the goods (Tr. 1609, 1612), although this would affect the proper debit balance to Joe Blitz (Tr. 1609);

(d) that he had not verified that any of the goods charged on his Exhibit 317 to Joe Blitz had actually gone to Joe Blitz (Tr. 1664-1665; Ex. 317, p. 2);

(e) that he did not know whether he had the complete Accounts Receivable ledger (Tr. 1613-1614);

(f) that he had not verified how much Joe Blitz actually owed the company (Tr. 1677);

(g) that he had consulted no books and records other than Exhibit 54-54A, the Cash Receipts book (Ex. 50) and the invoices (Tr. 1612).

Goetz, a Government witness, also testified that Exhibit 54-54A could be verified only by taking the total and comparing it with the general ledger (Tr. 2770).

GENERAL JOURNAL WAS NEVER AVAILABLE—The general ledger was not at first in court (Tr. 481-1539) but was brought in late in the trial Ex. 373; Tr. 2390) and introduced in evidence (Tr. 2822). The general journal for the year commencing June 1, 1946, was never in court. What was referred to as, and the Government claimed was, the general journal in the front part of the general ledger (Tr. 2730) is headed merely: "Journal Entries, Month of ~~May~~ ~~31~~ January 22, 1947." Except for two, all entries are as of January 22, 1947, or later. It plainly is not the general journal for the pertinent period from June 1, 1946, that might well contain adjusting or explanatory entries.[10]

Thus, it was plain that Exhibit 54-54A was not a verified record of the company; the expert had admitted that he had not referred to or verified his conclusions by pertinent records of the company; and that he had not balanced with the control account in the general ledger the Accounts Receivable ledger as adjusted by his Exhibits 317 and 318—indeed, this subsidiary ledger, he admitted, might be incomplete. Nevertheless, over objection (Tr. 1689) the summaries were admitted in evidence (Tr. 1689).

The method of summarizing complicated accounts cannot

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[10] It should also be noted that the Cash Receipts book in court (Ex. 50) did not cover the period prior to June 1, 1946, so as to permit checking its entries as to Joe Blitz against those few shown in Exhibit 54-54A for the prior period.

be made a means of putting before the jury conclusions of the witness drawn from sources of information not properly admissible in evidence. The rule goes no further than to permit a summary of the mass of records otherwise in evidence, or at least admissible in evidence and actually produced in court. *Berthold-Jennings Lumber Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 80 F. 2d 32, 44 (C. C. A. 8, 1935). Here the summaries were based on Exhibit 54-54A, a paper found in the hands of a third party, not the original or first permanent entry and not authenticated as a copy of a business record as required under 28 U. S. C., sec. 1732(a). *United States* v. *Fineberg*, 140 F. 2d 592, 596-597 (C. C. A. 2, 1944); *John Irving Shoe Co.* v. *Dugan*, 93 F. 2d 711, 713 (C. C. A. 1, 1937); *Greenbaum* v. *United States*, U. S. 80 F. 2d 113, 121 (C. C. A. 9, 1935). There was clearly absent here the circumstantial guaranties of trustworthiness, for which, as said by the second circuit, "regular course of business" in 28 U. S. C., sec. 1732(a), is the shorthand expression. *Hoffman* v. *Palmer*, 129 F. 2d 976 (C. C. A. 2, 1942) 980-981, aff'd 318, U. S. 109.

The witness's summaries were addressed to the question of how the company actually handled the Blitz Products Company account. But he admitted that in preparing such summaries he had ignored books and records of the company obviously pertinent to the question. The general journal might well include original entries showing adjustments explaining the appropriate identity of amounts and duplication of amounts referred to above. The expert did not check the validity of his conclusions with the general ledger, as Goetz's testimony showed was good accounting practice.

On this point the court below said (Appx., p. 20):

> "Of course, the witnesses' testimony and their compilations did not cover all contents of the records; they purported to cover only those items as to which an issue

> existed. There was no occasion for them to testify as to the contents of the records as to anything not in controversy."

This misses the point. A summary is not admissible in evidence which is based upon a microscopic part of the records pertinent to the issue to which the summary is addressed; e.g., a summary purporting to show a debit balance against a creditor and based solely on examination of sales invoices without reference to a Cash Receipts journal or Accounts Receivable ledger would scarcely be urged as an admissible summary on even that limited issue. So, here, the summary was prepared without reference to all the books pertinent to the conclusion.

The error was aggravated by the oral opinion of the expert based on the summary (Tr. 1599):

> "My opinion is that there was only one account, and that is the Joe Blitz account, Exhibit 54 & 54-A."

This clearly violates the rule that it is never proper for an expert simply to testify that the books show certain facts. The admission into evidence of the auditor's conclusion and opinions as distinguished from mere statements of facts summarizing what was observed by him in the records is clearly erroneous. *United States* v. *Michener*, 152 F. 2d 880, 883 (C. C. A. 3, 1945); *Continental Casualty Co.* v. *First Nat. Bank*, 116 F. 2d 885, 887 (C. C. A. 5, 1941); *Cooper* v. *United States*, 9 F. 2d 216, 223 (C. C. A. 8, 1925).

The adverse effect of the summaries and the oral opinion erroneously admitted was highly prejudicial, not only by reason of their inherent nature but particularly because of the general confusion engendered by the vast number of exhibits (more than 400) largely involving complicated accounting in a set of books that was admittedly inaccurate.

To this factor was added the impact of the witness's membership in the much publicized FBI.

Reference has frequently been made to the abuse of the "expert" practice as stated by Professor Morgan in American Law Institute, Model Code of Evidence (1942), p. 198-199:

> "Expert witnesses are all too frequently merely expert advocates. The most shocking exhibitions occur in criminal prosecutions and personal injury actions, but the evils are not thus confined."

Cf. *United States* v. *Mathias*, 36 Fed. 892, 894 (C.C.S.C., 1888).[11]

The increasing use of accounting experts in cases involving complicated accounts and particularly in income tax cases is plainly necessary, but, by the same token, requires the exercise of continuing vigilance to maintain the protections against hearsay evidence. Here it is manifest that the summaries reflecting, not the books and records of original entry, but rather an unauthenticated paper found in the hands of a third party, were prepared without reference to the books and records of the corporation pertinent to the validity of the conclusion to which the summaries are addressed.

There is thus presented a question of continuing and general importance to the administration of the criminal law. The exercise of this court's jurisdiction will serve not only to protect petitioner's right to a fair jury trial but, as well, to clarify and define the limits for the use of accounting summaries.

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[11] "Where the person called to testify as an expert is one occupying the relation to the case, which this witness does,—saturated with bias against the defendant, honestly convinced of his guilt, and, in the conscientious discharge of his duty, seeking to bring him to punishment,—he can afford the jury no efficient aid in coming to a fair and impartial conclusion. His evidence as an expert to the point indicated will not be admitted."

Conclusion

It is respectfully submitted that Writ of Certiorari should be granted.

WILLIAM D. DONNELLY,
JOHN E. HARTSHORN,
Counsel for Petitioner.

March 1953.

CUMMINGS, STANLEY, TRUITT & CROSS,
Of Counsel.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM AND SESSION, 1952

Nos. 10540 and 10541

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

BELLE MARACHOWSKY, etc., and J. H. MARACHOWSHY, etc., *Defendants-Appellants*

Appeals from the United States District Court for the Western District of Wisconsin

January 7, 1953

Before Major, Chief Judge, Kerner[1] and Lindley, Circuit Judges

LINDLEY, *Circuit Judge:*

Defendants, indicted in fourteen counts charging the making of false oaths in a bankruptcy proceeding and in one, the 15th, with conspiracy, having been found guilty and sentenced, perfected this appeal. They are man and wife. It should be observed, however, in order to avoid confusion, that Belle Marachowsky's maiden name was Canel; that she married Joseph Blitz, divorced him and resumed her maiden name, and, later, married Jake Marachowsky.

Counts 1, 3, 5, 7, 9, 11 and 13 charged Belle Marachowsky with making false oaths in the bankruptcy proceedings of the Portage Wholesale Company in support of her amended claim for $126,780.09 filed against that estate. Counts 2, 4, 6, 8, 10, 12 and 14 charged false oaths upon the part of Jake Marachowsky in the same proceeding in support of

[1] Judge Kerner participated in the consideration and disposition of this case but died before the formal opinion was announced.

Belle Marachowsky's claim. Count 15, as we have observed, charged conspiracy by both to present a false claim against the debtor estate and to make false oaths in such proceeding in relation thereto. Belle Marachowsky was sentenced to two years in the custody of the Attorney General and to pay a fine of $10,000. Jake Marachowsky, upon each of the substantive counts, was sentenced to five years in the custody of the Attorney General, all the sentences to run concurrently. Upon counts 2, 4, 6, 8 and 10, he was fined the sum of $5,000 each, or $25,000 in all. On the 15th count he was sentenced to two years in the custody of the Attorney General, to run concurrently with the other sentences.

Upon appeal defendants urge that the evidence adduced by the government was not sufficient to meet the requirements abiding in prosecutions for taking false oaths; that the court should have allowed their motions for acquittal, and that the court committed certain prejudicial errors. In view of the first mentioned contention, it becomes necessary to examine, somewhat in detail, the evidence submitted by the government.

Among the salient facts as established by the evidence viewed in its aspects most favorable to the government are the following. The Portage Wholesale Company was a corporation doing business in Portage, Wisconsin, of which the defendant, Jake Marachowsky, owner of 52 per cent of the capital stock, was president and manager; associated with him was his brother Jule. The company was engaged in buying and selling butter, cheese, corn, syrup, dextrose and other food products during the years 1945 and 1946, while price control was in effect. It bought merchandise apparently within controlled prices and disposed of the same on the black market at sharply increased over-ceiling prices.

Preceding those years Joe Blitz and defendant Belle Marachowsky, then Belle Blitz, lived at Chippewa Falls, Wisconsin. In December, 1944, they came to Portage where Joe was employed by the company. He remained there, however, only a short time, after which he proceeded to New York, where he acted as agent of the company, selling the products in eastern territory. Very frequently the

larger part of his sales prices was received in currency and placed in envelopes which, from time to time, he and his wife carried from New York back to Portage. Blitz received his instructions from Jake Marachowsky by letters and unsigned typewritten memoranda. Many of these instructed Joe to get from 15 to 16 cents per pound for corn syrup and 18 to 19 cents per pound for dextrose, at a time when the legal maximum price was 5 cents and 7 cents respectively. Frequently cars of merchandise were shipped on open bill of lading consigned to Blitz, who received and delivered the bill of lading to others, collecting the sales price fixed as aforesaid. If a car was shipped with draft attached to the bill of lading, Joe would pay the draft with cash received from selling the company's products and then sell the car. He was employed on a commission basis; the company always owned the merchandise and never sold it to him.

One John Olson was, during the year 1946, employed by the company to purchase products in Iowa and Nebraska. Jake supplied Olson with signed checks of the company which Olson filled in and used in making purchases. Olson also received from the company, cash aggregating some $75,000, which he used in buying products for the company. Olson received all his instructions from Jake and none from Belle, although at Jake's request he was handed money by Belle in envelopes, for which he accounted to the company. He was working for the Portage Wholesale Company and considered Belle its agent.

Price ceilings terminating on June 30, 1946 were never renewed, so far as corn was concerned, but were placed in force once more on corn syrup and dextrose after July 25, 1946. The company paid Burbridge of Omaha a finder's fee for corn, which, before ceilings were removed, was $200 per car and thereafter $100 per car. This firm dealt with Jake and Olson, never with Belle. This corn was shipped from Nebraska and Iowa to brokers in Chicago on sight draft. The brokers paid the drafts and delivered the corn to the refinery, American Maize Products Company. If the market price dropped while the goods were in transit, the drafts were reduced and the company paid the difference to the elevator which had supplied the corn.

For every six cars of corn so made available to American Maize, the Portage Wholesale Company was permitted to buy from the refinery one car of dextrose, or two cars of corn syrup, which were then shipped to Portage with draft attached. The company paid for them and reshipped them, invoicing them to Blitz in New York within the ceiling price, who then sold them at prices suggested by Jake Marchowsky, in excess of ceilings.

Despite the volume of business transacted, the company apparently found itself without funds in January, 1947, when it filed a petition for arrangement under Chapter XI of the Bankruptcy Act.

About a week before the debtor proceeding was instituted, Belle brought suit against the company for some $36,000 which she claimed to have loaned to it. At about the same time, Joe Blitz commenced divorce proceedings against Belle who, on adverse examination, testified that this $36,000 was all the company owed her. However, in August, 1947, she filed claim against the debtor for $67,926.06. On October 14, 1947, she was divorced from Blitz and resumed her maiden name, Canel. On October 20, 1947 she filed a bill of particulars of her claim in which she said that no notes or other written evidence existed to support her demand except certain checks listed therein. On March 22, 1948, at an adverse examination, Belle produced, for the first time, a series of invoices, known as Exhibits 11 to 16 inclusive, partly in Jake's handwriting and partly in Belle's, purporting to have been prepared in 1946. No one had ever seen these invoices before March 22, 1948 except Jake and herself. The circumstances appearing in the record fully support the government's contention that they were fraudulently manufactured solely to support Belle's claim.

Some three months later she filed an amended claim for $126,780.09. At a hearing in July and August, 1948, before the referee, Belle and Jake gave the testimony charged in the indictment to have been false. The company was ultimately adjudicated bankrupt and claims against it can not be paid in full. In November, 1948, Belle and Jake were married.

With this sketchy picture in mind, we divert our discus-

sion for the time being to the statute and the authorities. The wording, "knowingly and fraudulently makes a false oath" in a bankruptcy matter, is that of the revised criminal code, Title 18, Sec. 152, superseding a similar provision in the Bankruptcy Act, Sec. 52, Title 11 U. S. C. (1940 Ed.), in effect removing the latter entirely from the Bankruptcy Act but including it in the revised code, under Chapter 9 as a part of "Offenses under the Bankruptcy Act." Consequently, the perjury statute, 18 U. S. C. Sec. 1621 is not involved here, previously Title 18 U. S. C. (1946 Ed.) Sec. 231. One accused of false swearing in a bankruptcy proceeding was punishable under either former Sec. 52 of Title 11 or the general perjury statute, the punishment only under Sec. 52 being different. *Epstein* v. *U. S.*, 196 Fed. 354 (C. A. 7).

Various decisions have from time to time indicated that there is a legal difference between the crime of a false oath in bankruptcy proceedings and perjury. This Court, in *Goetz* v. *U. S.*, 59 F. 2d 511, in reviewing a conviction under the earlier provision of the Bankruptcy Act, similar in all ways to the present one, said: "Appellant seeks to interpret each count of the indictment in the light of the statute and decisions relating to perjury, and they are not applicable to the instant case." Recently, Judge Kerner, speaking for the court, in *U. S.* v. *Lynch*, 180 F. 2d 696, said, at 701: "But this court has held that proof of false oath in bankruptcy need not contain all of the elements of perjury." In *Weschler* v. *U. S.*, 158 Fed. 579 (C. A. 2), the court held that the bankruptcy provision did not create a new offense but merely prescribes a different penalty for the crime of perjury already defined by Congress, when committed in or in relation to bankruptcy proceedings. And in *Schonfeld* v. *U. S.*, 277 Fed. 934 (C. A. 2), the same court said: "False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. *Kahn* v. *U. S.*, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing. *Kahn* v.

U. S., supra." By retaining the same wording, in the revised criminal code, it may well be urged that Congress tacitly approved the interpretations of such words by the courts under the previous statute. *Morris Plan Ind. Bank* v. *Finn*, 149 F. 2d 591 (C. A. 2). However, other decisions refuse to distinguish between the two crimes. In view of our conclusions, it is not necessary that we ground our decision upon any possible distinction between the two offenses.

In view of the uniqueness of the rule commonly held applicable in perjury cases, we think it well to refer to judicial discussions of this procedural standard. *U. S.* v. *Woods*, 39 U. S. (14 Pet.) 430, contains a resume of the common-law rule and the relaxations recognized at the time of that decision (1840). That case involved a statute forbidding false oaths by an importer. Specifically the court said: "We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule. * * * if it shall be seen, that the fact to be proved is an act of the defendant, which, from its nature, can be concealed from all others except him whose cooperation was necessary before the act could be complete, then the admissions and declarations by the defendants, either in writing or to others, in relation to the act, become evidence. It is no longer a question of the quality but of the quantity of evidence," and concluded that "in order to convict the defendant of the crime charged in the indictment, it is not necessary on the part of the prosecution to produce a living witness; if the jury shall believe the evidence from the written testimony sufficient to establish the charge that the defendant made a false and corrupt oath as to the cost of the goods imported * * *."

In *Hammer* v. *U. S.*, 271 U. S. 620 at 627, the language is "That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in *United States* v. *Wood*, 14 Pet. 430, 443. That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as

perjury, does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly in some cases documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony."

In *United States* v. *Buckner*, 118 F. 2d 468 (C. A. 2) at 469, the court said: "* * * the repeated admissions of the defendant that her testimony before the grand jury was false was a fair substitute for the confirmatory testimony which is generally required in perjury cases." The court continued: "In *United States* v. *Wood*, 14 Pet. 430, 439, 441, 10 L. Ed. 527, * * * The Supreme Court held that even a single witness to the *corpus delicti* is unnecessary when the truth of statements alleged to be perjured is 'directly disproved by documentary or written testimony springing from [the defendant] himself, with circumstances showing the corrupt intent. * * *' In that action the defendant's own invoice book and letters contradicted the cost which was set forth in his so-called 'importer's oath'. These papers were held sufficient proof to justify submission of the case to the jury although no witness of the *corpus delicti* was produced."

In *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2), where no witness testified as to the falsity charged and the proof was entirely circumstantial, the court said, at 249: "But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated.[7] This distinction was laid down in *United States* v. *Wood*, 14 Pet. 430, 10 L. Ed. 527, which has been often followed.[8] Since only written declarations will suffice, it follows that if the critical issue must be proved by 'direct' evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited

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"[7] We lay to one side a possible exception as to contradictory oral declarations made by the accused under oath, as the case at bar involves no declarations of this character. See Wigmore, Evidence, 3rd ed., Sec. 2043."

"[8] *Clayton* v. *United States*, 4 Cir., 284 F. 537, 540; *Phair* v. *United States*, 3 Cir., 60 F. 2d 953, 954; *Hart* v. *United States*, 9 Cir., 131 F. 2d 59, 61; *Fotie* v. *United States*, 8 Cir., 137 F. 2d 831, 840. Compare *United States* v. *Harris*, 311 U. S. 292, 61 S. Ct. 217, 85 L. Ed. 196."

to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by 'direct' evidence. And this view is confirmed by Chief Justice Vinson's opinion in *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 411, 70 S. Ct. 674, 690, 94 L. Ed. 925, where it is said: "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much "overt acts" as the act of joining the Communist Party, there can be no successful prosecution for false swearing.'"

In *Kahn* v. *U. S.*, 214 Fed. 54 (C. A. 2), after commenting that a prosecution under the earlier Bankruptcy Act (Act of July 1, 1898, Sec. 29, sub. "n" (2)) evidently was regarded by Congress as not equal in degree to the crime of perjury, the court continued: "If this view of the situation be correct it is manifest that the burden of proof in perjury cases is not necessarily applicable here," but added "However, the ancient rule * * * has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt." After citing and commenting on certain decisions, including *U. S.* v. *Wood*, 39 U. S. (14 Pet.) 430, the court concluded: "Without pursuing the subject further we think that the ancient rule has become inapplicable to modern conditions and has been relaxed to such an extent that evidence which not only contradicts the testimony of the defendant but so far preponderates as to justify the jury in finding that the latter was not only false but was made by the defendant knowingly and fraudulently is all that is required to prove a crime under 29b(2) of the Bankruptcy Act."

Concerning corroboration, the third circuit in *United States* v. *Margolis*, 138 F. 2d 1002, said at 1003: "In *United States* v. *Palese*, 3 Cir., 133 F. 2d 600, 603, 604, we held that a conviction could be sustained if competent evidence

corroborated the falsity of the oath and that particular circumstances which indicated its falsity need not be corroborated." In *United States* v. *Palese*, 133 F. 2d 600 (C. A. 3), after concluding that it would adhere to the rule requiring at least one living witness and corroboration, the court added that the rule had been subjected to much "well reasoned criticism" citing 7 Wigmore on Evidence, 3rd Ed. §§ 2040-2043; *Marvel* v. *State*, 1925, 33 Del. 110, 3 W. W. Harr. 110, 131 A. 317, 42 A. L. R. 1058, and continued: "Thus, in *Goins* v. *United States*, 4 Cir., 1938, 99 F. 2d 147, 149, the court said: 'It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes. * * * The old "oath against oath" reasoning of the earlier decisions is without force now that the defendant is allowed to take the stand and that corroboration sufficient to satisfy the jury of the falsity of the oath may well arise from his demeanor and manner of testifying.'" In *State* v. *Storey*, 148 Minn. 398, 182 N. W. 613, 15 A. L. R. 629, the court pointed out forcibly that it is inconsistent to hold that evidence which is of the quality sufficient to hang a man for murder is insufficient to convict him of perjury.

Thus it seems apparent that the tendency has been to relax the rule governing the strictness of proof required in perjury cases and that, only with obvious reluctance, have the courts adhered to the harsh postulate which requires in a perjury case a greater degree of proof than in a murder case. However, despite this growing drift toward substitution of a saner rule requiring only that the evidence be sufficient to prove guilt beyond all reasonable doubt, in view of the fact that the District Court adhered to the old precepts and in view of our conclusions, we shall do likewise in disposition of this appeal.

Counts 1 and 2 specifically respectively charge Belle and Jake with false oaths with reference to a transaction with one Frank Figge upon which a part of her claim was based. Belle's testimony was that $32,999.17, which came to Portage Wholesale Company from Figge was hers; that she had given it to Figge partially personally and partially

through Olson. Jake's allegedly false oath in this respect was that he understood this money to be Belle's.

The evidence adduced by the government bearing upon the issue of falsity of these statements was that Figge met Olson, a representative of Portage Wholesale Company, who was in search of butter for the company, in 1946 in Omaha and sold him butter; that, later in the year, Figge bought an additional creamery and needed capital to finance the purchase; that Olson agreed that the company would advance him money for butter and eventually filled in blank checks of the wholesale company, signed by Jake as president and handed by him to Olson, who delivered them to Figge, totalling $99,384.10. Certain deliveries were made to the company resulting, in July, in a balance due from Figge to Portage Wholesale Company, on account of over-payment to him, of $33,000. For this Figge wrote a check to the company and delivered it to Olson, who later returned it to Figge, saying that Jake wanted cash. On July 12, Figge had his bank wire the $33,000 less charges, to Home Savings Bank, Milwaukee, for the credit of Portage Wholesale Company. On the company's books the payment was, apparently by mistake, credited to another creamery in Nebraska and remained so credited at the time the company filed its proceeding in the bankruptcy court. Jake told the company accountant that this sum was due Portage Wholesale Company for money advanced for butter not delivered. When the receiver was appointed, Jake made no claim that the money did not belong to the company or that Belle had any interest in it.

The material issue on these counts, then, was as to whether the $33,000 was money which Belle had paid to Figge as she swore before the referee. Figge testified that he had met Belle once or twice, but that he never had any business transactions with her, and never received from her any money, any letter, telegram or other communication, as she had testified. Here was direct testimony by one witness contradicting the truth of her testimony, in compliance with the requirements of the more strict rules governing proof of false oaths.

The corroborating evidence is that above related and,

in addition, that on April 11, 1947, Belle had testified, in other litigation, that the debt due her from Portage Wholesale Company was $36,000 for money she had loaned that company in cash and by check; that the company owed her for nothing more, though she later swore in the bankruptcy court that the company owed her over $126,000. Her further acts, relied upon by the government as inconsistent with her sworn testimony and corroborative of the testimony of Figge as to the falsity of her statement that she had advanced him almost $100,000, despite her admission in 1947 that the company owed her only $36,000, are that, in addition, she first swore in the bankruptcy court that the company owed her $67,926; and, later, that it owed her $126,000. In her claim she swore that no written evidence existed to support it except certain specified checks; yet, in 1948, in the bankruptcy proceeding, she produced, to support her claim, six invoices, partly in her handwriting and partly in that of Jake, purporting to have been in existence since 1946, at the time when she sued for $36,000 and swore that was all the company owed her, and at the time when she made oath that no written evidence of her debt existed. Yet these written invoices purported to show the entire finally claimed debt. Further corroboration of Figge's testimony showing the falsity of Belle's claim that she gave the money to him lies in the fact that the company's checks to Figge, totalling $99,384.10 showed payment by the company to Figge. Many other corroborating circumstances appear in the record. Taken all together the proof includes the direct testimony of a witness and ample facts and circumstances corroborating the alleged falsity of the oaths of both Belle and Jake in the bankruptcy proceedings, in this respect.

In counts 3 and 4 it was charged that both Jake and Belle made false oaths before the referee in that Belle testified that while she was in New York, Jake telephoned her directing her to give one Spiritus the money necessary to take up a sight-draft accompanying a bill of lading for a car of butter shipped to New York; that she gave Spiritus $27,240.57 in currency for that purpose, and that later Spiritus repaid Portage Wholesale Company for her credit. Jake swore that when the car reached New York, the company did not have the money to take up the draft; that he asked Belle

to advance it; that after Spiritus took up the draft and secured release of the car, he, Spiritus, remitted to Portage Wholesale Company and that when the payment came in, he credited it to Belle.

The evidence adduced by the government was that the car was shipped from a creamery in Nebraska consigned to Portage Wholesale Company, care of Joe Blitz, New York. When notice of the shipment came to the company, c/o of Blitz, the latter notified Spiritus, who had ordered the butter from the company. Someone other than Spiritus paid the draft, but he received an invoice for the car from the company and mailed to the company his check for the purchase price. On the company books, the face amount of the invoice was charged to Spiritus and the payment credited to him. Spiritus testified that he never had any transactions with Belle; that he never received any money from her; that she never discussed with him any of the transactions he had with Portage Wholesale Company with whom alone he dealt and to whom he remitted payment.

Thus we have the direct testimony of Spiritus that the oaths of Belle and Jake in the bankruptcy proceedings were false and corroborating evidence of that falsity in the circumstances above related, and in the further circumstances that Spiritus' records reflected no receipts of money by him from Belle to pay the draft. He received his invoice from the company and made payment to the company by check. The records of the company show a credit of the remittance to Spiritus and not to Belle; this credit remains in the records. The draft was for $26,856.90, whereas Spiritus' payment to the company was $27,240.57. The lately discovered invoice, Exhibit 12, purporting to credit the payment to Belle, shows payment of the draft to have been $27,240 whereas it was, in fact, only $26,856.90. Furthermore there was other evidence in various circumstances fully warranting the jury in believing that the testimony of each defendant in this connection before the referee was false.

Counts 5 and 6 charge that Belle swore falsely before the referee that Jake called her by telephone, asking her to give Spiritus the money with which to get released a car of cheese; that she gave Spiritus $11,147 to pick up

the draft but that Spiritus remitted only $10,000, because the market had dropped. The charge is further that Jake swore falsely that he asked Belle to take up the draft.

This car of cheese was shipped to North Egg Company, c/o Joe Blitz, New York; for it the Portage Wholesale Company drew a draft on North Egg Company, c/o Joe Blitz, in the amount of $11,160.71. Spiritus' checks aggregated $11,158.21. Two days later he remitted by check to Portage Wholesale Company $10,000, who received it and credited it to Spiritus' account. Spiritus testified that he received no money from Belle and never had any transactions or communications with her. Again the falsity of the oaths was corroborated by the circumstances previously related and others in evidence.

In counts 7 and 8 it is charged that Belle swore falsely before the referee that two certain cars of sugar and one of dextrose belonged to her; that she shipped them to Brockelman Brothers, Worcester, Mass., that they were bought from her by one Harry Robinson; that Brockelman Brothers remitted $26,179, their purchase price, to Portage Wholesale Company, and that Robinson also paid her $11,000 or $12,000 in currency; that this was her money. Jake testified that Belle was, as he understood it, entitled to credit for the $26,179.

These cars were shipped by American Maize Company to Portage Wholesale Company. Upon arrival, the consignee paid the draft in the sum of $11,519.47 by its checks. The company then shipped the cars to Brockelman Brothers, invoiced to J. Blitz. Portage Wholesale Company telegraphed Brockelman Brothers for an advance on the cars of $26,000 and at the request of Brockelman Brothers, the latter's bank telegraphed $26,179 to Portage Wholesale Company, who credited the payment to the account of Blitz Products Company, but posted it to the account of Joe Blitz.

Robinson, who acted for Brockelman Brothers, testified that he did not know Belle; that he dealt only with Jake and Jule Marachowsky and that he never had any transactions with Belle or paid her any money. Exhibit 14, another of the lately discovered exhibits purports to invoice a sale of the three cars to Belle. No record of such an invoice appeared anywhere in the sales invoices of the com-

pany. Morrison testified, further, that, after bankruptcy intervened, Jake, while in Worcester, told him that some question had arisen about sugar, and asked him, if he should be questioned about it, to state that he bought it from a subsidiary or some company other than Portage Wholesale Company, and that he told Jake that he would have to stand on the record.

We have referred to Belle's many statements and acts inconsistent with her testimony which tend to corroborate the falsity of her testimony before the referee in this respect also. Ample further corroboration is found in other circumstances in evidence.

Counts 9 and 10 relate to a transaction with Morrison doing business as Peak Products Company. Belle made oath before the referee that she sold a tank car of syrup to Morrison for $13,648, who remitted that amount to Portage Wholesale Company. Jake swore that this sum was due Belle. Both statements were alleged to be false. This car was shipped by American Maize Company to Portage Wholesale Company with draft attached to bill of lading. Portage Wholesale Company paid the draft for $5140.61 and, the next day, invoiced it to "Joe Blitz Corn Account" at $5607.28. Morrison had ordered the car from Portage Wholesale Company and gave his check for $13,-648 to his bank in New York, who then wired the remittance to the credit of Portage Wholesale Company. Morrison testified that he never met or knew Belle before he saw her in the bankruptcy court; that he never had any transactions or communications with her; that he never bought anything from her; that he ordered the car of syrup from Portage Wholesale Company, and knew no one else in the transaction.

Again it is obvious that a witness testified directly and certainly to the falsity of the sworn statements of both defendants in this respect. The attending circumstances are fully corroborative, including the pencil note from Jake to Joe Blitz, listing the car at 16 cents a pound, the remittance to the company, and other facts and circumstances in evidence.

In counts 11 and 12 it is charged, in the first, that Belle swore falsely that she sold a car of dextrose to Jack Sims

for $16,500; that she saw him in New York and directed him to send the money to Portage Wholesale Company; in the second, that Jake made false oath that this was Belle's money.

This car was shipped by American Maize Company to Portage Wholesale Company, who paid for it, $7,285.32, and then invoiced it to "Joe Blitz Corn Account" at $7,735.32. However, Portage Wholesale Company borrowed on the bill of lading, from its bank, $16,500 which it credited to Blitz Products Company and posted to Joe Blitz. The car purported to be shipped from Portage by "Blitz Products Company," consigned to the same party, "care of Joe Blitz." The bill of lading was endorsed "Blitz Products Co., c/o Krueger" in Jake's handwriting. Jake sent Joe Blitz a note listing the price at $16,500 and informing Joe that the car was to go to Simms at Lorraine, Ohio. One Samuel J. Sens of that city had ordered the car by telephone directing it be sent to Peak Products Company. Sens is also known as Jack Sens and Jack Sainnes. Sens and Morrison of Peak Products worked together on the deal, selling the car to Monarch Wine Company, who paid the draft for $16,500, drawn by Portage Wholesale Company.

Sens testified he did not know Belle; that he dealt only with Jake and Jule Marachowsky and had no transactions with Belle. His testimony of the falsity of the defendants' sworn statements was corroborated by the foregoing circumstances and others, including Belle's own previous inconsistent acts and statements, the bank records and those of Peak Products Company.

In count 13 it is averred that Belle swore falsely that one Robert Blumberg owed her $43,700 for corn which she had sold him, and that he wired the payment to her in satisfaction of the debt. Blumberg operated the Canned Meat Corporation, in New York City, and shared an office with Sol Abramson, who dealt with him in various sorts of food products. He testified that he didn't know Belle; that he bought nothing from her, did not talk to her and had no transactions with her. It seems that Blumberg had some transaction with Abramson, as a result of which he gave to the latter three checks aggregating $35,000 which Abram-

son later turned over to Jake or Belle. Later Abramson reported to Blumberg that Belle said Jake demanded more money and would not accept checks. Thereupon Abramson asked Blumberg to wire Belle $43,750 and he did so. Without prolonging the recital of evidence offered in support of this count, upon careful consideration, we are content to dispose of it with the observation that there is no direct testimony by Blumberg that he did not remit the money to Belle. What the transactions betwen Blumberg and Abramson, what, if any, the deals between Abramson and Belle and Jake, were all uncertain and conjectural; taken as a whole, the evidence is insufficient, we think, to sustain the verdict of guilty on this count.

In the 14th count, it was charged that Jake swore falsely before the referee that the invoices belatedly discovered appeared on the books and records of the company; that on December 23, 1946 he had "the sheets" before him and thought the entries were duly entered. We need not repeat the circumstances already recounted. The company bookkeepers, three in number, testified fully as to the records,—the cash receipts book, the ledger sheets, the general journal and the general ledger. In them were recorded the entries as originally made; in none of them appeared the invoices involved. No one of the witnesses had ever seen or heard of them. Indeed, an accounts receivable in Belle's name which they had seen had disappeared and had been missing ever since. Furthermore one of them, who prepared the schedules of creditors for the debtor proceedings, testified that Belle's name did not appear as a creditor anywhere in the books and that the records disclosed no debt due her. These facts, coupled with all the other evidence, made the issue on this count, a jury question.

Count 15 charged conspiracy by both to commit an offense against the United States, towit, to present and use a false claim and a false amended claim against the debtor's estate and to make false oaths in said proceedings in relation to said claims. Numerous overt acts were charged. Without further prolonging discussion of the facts, we think it clear that the evidence constituted proof sufficient to require that the questions involved in this charge against both defendants be submitted to the jury.

From the authorities previously cited, it is clear there can be no question that circumstantial evidence may legitimately constitute sufficient corroboration of a single direct witness to establish a charge of false oaths in a bankruptcy proceeding. See also *United States* v. *Hiss*, 185 F. 2d 822, 830 (CA-2); *United States* v. *Seavey*, 180 F. 2d 837 (CA-3), cert. den. 339 U. S. 979. *Radomsky* v. *U. S.*, 180 F. 2d 781 (CA-9) cited by defendants stands only for the proposition that where there is no direct testimony of a witness to the falsity charged, circumstances alone are not sufficient to sustain a conviction and distinguishes between such unsupported circumstances and documents emanating from the defendant, as was the case in *United States* v. *Wood*, 39 U. S. 430. The case is also additional authority for the proposition that documents originating with the accused are admissible. Thus Belle's inconsistent statements and claims were proper aids to the jury in its determination. Upon review of all the evidence we find no justification for defendants' insistence that the court erred in denying their respective motions for acquittal.

The court fully and carefully instructed the jury as to its duty as sole judges of the facts; the separate charges in the various counts of the indictment; the applicable statutes; the various rules pertaining to credibility; the presumption of innocence; the government's burden of proving guilt beyond all reasonable doubt; the nonevidentiary character of the indictment; what constitutes a reasonable doubt; the jury's duty to endeavor to reconcile the evidence with the presumption of innocence, if it could be done reasonably; the duty to ignore excluded evidence and arguments of counsel with regard thereto; counsel and court comments on objections; expert testimony and the limitations on its effect; the fact that no charge of violation of ceiling prices was involved; the lack of materiality of the referee's ruling on Belle's claim; the definition of false oaths; the fact that even though testimony is false, if the witness honestly believes it to be true, it is not false; willful and conscious falsity; the requirement that to convict, there must be at least one direct witness contradicting the alleged false statement, and facts and circumstances cor-

roborating the alleged falsity; direct evidence; circumstantial evidence; the requirements of the essential corrobative evidence; the duty to treat each count as a separate charge; the requirements of the rule as to each count; the essentials of proof of Count 14 against Jake and the nature of and the proof required under Count 15 charging conspiracy against both defendants. This charge, covering some thirty typewritten pages, was full, fair, impartial and complete in all essential details; it meticulously sought to protect defendants in all particulars and reflects a careful and studious attempt on the part of the trial court to safe-guard the rights of defendants and to advise the jurors fully of what was necessary to warrant a verdict of guilty.

Notwithstanding the careful comprehensiveness of the charge, defendants urge that the court erroneously advised the jury that it might convict on circumstantial evidence alone and unduly and improperly commented in its charge upon the various single witnesses who testified in support of the respective counts. Defendants' assertion that the court undid what it had done in instructing the jury of the requirement of one direct witness and corroboration thereof, in its charge concerning circumstances thereby led the jury to believe that it could convict on circumstantial evidence alone is, we think, wholly without merit. The part of the charge objected to appears in the footnote.[2] The

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[2] Sometimes circumstantial evidence is even more convincing than direct evidence, because direct evidence may depend upon the memory or observation and truth of one witness, while circumstantial evidence may be produced and depend upon the memory, observation, and truth of many witnesses who concur and agree, or upon physical facts, which cannot be mistaken and cannot speak falsely.

But to warrant your use of circumstantial evidence as a basis for finding the guilt of the defendants, or either of them, each fact necessary to the conclusion of guilt must be proven beyond a reasonable doubt; and all the facts so proven must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken altogether, must be of a conclusive nature, and producing, in effect, a reasonable and moral certainty of the fact to be established.

The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide

court had already warned the jury of the strict requirements of proof governing charges of false oaths. It gave to the jury in this respect the instruction appearing in the footnote.[3] It is clear that when the court charged the jury as indicated, it had previously defined the essentials of proof. The later charge complained of was merely manifestation of the court's desire to explain fully the characteristics of circumstances as corroboration. No one could possibly have been misled. Defendants' rights were safely guarded in this respect.

Defendants also contend that the court improperly commented on the evidence, in that it emphasized that as to each count not only must the jury believe the witness who had testified as to the falsity charged, but also that other evidence corroborated the direct testimony of falsity.[4] This, say defendants, was equivalent to saying that if the jury believe the witness and the corroborative circumstances, it should find defendants guilty. Again defendants have singled out one paragraph only, ignoring entirely the court's full exposition of the law governing what the government was bound to prove. Read as a whole,

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with and render probable the guilt of the accused. The facts so proven must be inconsistent with innocence, and incapable of explanation upon any other reasonable theory than that of guilt.

[3] The corroborative evidence must be trustworthy.

Unless the evidence meets these standards, it is not sufficient to corroborate the testimony of the single witness.

If you fail to find that, as to any count, there is both direct evidence of the falsity of the statement and corroborative evidence, then as to that count you must acquit the defendant charged in that count. This means that, as to the first fourteen counts, you must carefully consider the evidence, and look in each instance to see if there is testimony of at least one witness which you believe directly establishes the falsity of the oath, plus corroborative evidence of the nature I have just described.

[4] Typical of the various charges in this respect is the following: "Before you can find Belle Marachowsky guilty on Count 1, or find J. H. Marachowsky guilty on Count 2, you must believe beyond a reasonable doubt; First, Mr. Frank Figge's testimony that he had no transactions with Belle Marachowsky, and that she had not given money to him personally and by her agent; and, second, that there is other evidence in this case which corroborates the testimony of Mr. Figge, and proves beyond a reasonble doubt that the defendant charged in that count knowingly testified falsely with regard to this transaction."

there can not have been the slightest confusion of the jury. The trial court may comment on the evidence if it does so fairly. This the court did here. Furthermore the objections taken to these portions of the charge were not sufficient to raise the point urged. Indeed, the record shows no objection at all by Belle, and an objection of an entirely different species by Jake. As a matter of fact one reading these specific charges can conclude only that they were beneficial to defendants.

Defendants urge that the court erroneously refused to give their tendered fifth instruction, in which they asked the court to charge that certain documents introduced in evidence were presumed to have been executed on the dates they bore. There was direct testimony by defendants that the documents were fully executed on those dates, and circumstantial evidence to the contrary by the government,—the reasonable inferences from all of which were for the jury. In this situation with evidence both pro and con, the presumption became mereged with the direct issue of fact, to be determined, not by the presumption but, by the evidence pro and con. The presumption was no longer material or relevant. Inasmuch as the court had fully charged the jury of the government's burden, and this specific issue was one of fact, we find no prejudicial error in refusing this instruction.

We reach the same conclusion as to the refused sixth instruction which sought a charge that it was immaterial whether a certain contract would have been binding in a civil case. All other parts of the tendered instruction had been fully covered. This specific postulate was, we think, wholly immaterial. There was no issue as to the binding effect of the contract, if it was genuine; to have given this instruction might well have confused the jury by injecting an immaterial issue for its consideration. At any rate, the refusal to give it was, we think, entirely harmless.

Defendants' eighth and ninth instructions, refused by the court, sought to have the jury charged that it was immaterial whether the contracts and checks issued by a corporation were recorded. These instructions too, we think, tended to suggest to the jury an issue which was not pre-

sented. There was a controversy concerning the checks. The fact that they were not shown in the records of the company was a circumstance which the jury had a right to consider. Consequently, the instruction, insofar as the checks were concerned, would have been misleading. Furthermore there was no issue as to whether the contract had ever been recorded; that issue was not presented and was wholly immaterial.

By their sixteenth requested instruction, defendants sought to have the jury advised that a witness is not guilty of perjury when he swears falsely, if he believes the fact to be true, though without any reasonable cause. Apparently the objection to the refusal to give this instruction was not made within the time fixed by Rule 30 of Federal Rules of Criminal Procedure. In the absence of unusual circumstances we are not justified in considering any alleged error in such situations. *Coppersmith* v. *U. S.*, 176 F. 2d 353 (CA-4). However, on the merits, there was no prejudicial error in this respect, for the court had charged the jury that the issue as to each defendant was whether he swore to what he knew to be false, that in this respect it is not an offense if a person swears to something which he believes to be true even though such testimony is false, that it is not an offense to be mistaken, and that one must willfully and consciously swear to that which he knows is not the truth. To our mind this fully covered everything that the tendered sixteenth instruction included. Of course, it was not necessary that the exact language of tendered instructions be followed. It is enough that they have already been given in substance. *Sugarman* v. *U. S.*, 249 U. S. 182; *May* v. *U. S.*, 175 F. 2d 994 (CA-DC).

Defendants urge error in that the court admitted in evidence summaries of certain books of accounts of Portage Wholesale Company made by duly qualified auditors. The cash books, invoices, general journal and ledger were all introduced in evidence or made fully available to defendants before the conclusion of the trial, when it was still possible to cross-examine the auditors or to recall them for additional cross-examination. In this situation, the summaries were clearly admissible. Of course, the witnesses' testimony and their compilations did not cover all contents

of the records; they purported to cover only those items as to which an issue existed. There was no occasion for them to testify as to the contents of the records as to anything not in controversy.

It is insisted in behalf of Belle that the books and records of Portage Wholesale Company were inadmissible against her. It must be remembered, however, that both defendants were charged with conspiracy and that these documents were clearly admissible against Jake. If Belle desired an instruction that they were to be considered only as against Jake, she had the opportunity to request such a limitation in the charge of the court; this she failed to do. The court at great length explained to the jury the essential elements of a charge of conspiracy and of the requirements of proof sufficient to justify a verdict of guilty. If either defendant desired anything additional in that respect, the time and place to obtain it was then and there in the trial court. *Coppersmith* v. *U. S.*, 176 F. 2d 353 (CA-4).

Defendants' contention that the court improperly instructed the jury that the testimony of defendants before the referee was material to the issues under consideration by that official is without merit. Thus, in *Sinclair* v. *U. S.*, 279 U. S. 263 at 298 the court said "and the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court (citing cases) * * *. It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury." The second circuit in *Carroll* v. *U. S.*, 16 F. 2d 951 at 954 ruled likewise in these words: "But whether it was any 'material' matter was a question of law for the court and was not for the jury," citing many cases in other jurisdictions.

In further support of their contention that the court should have directed a verdict for each defendant, defendants argue at length the alleged insufficiency of the evidence. Of course, the case is not tried here *de novo*. We have nothing to do with questions of credibility or weight of controverted testimony; we may inquire only as to whether the evidence, factual and circumstantial, together with the reasonable inferences to be drawn therefrom, made out a controverted question of fact for the jury. And

in determining that issue we must necessarily consider the evidence in its phases most favorable to the government. Consequently we have carefully examined the voluminous record of parol and documentary evidence. After such consideration, we conclude that it was entirely adequate to justify a finding of the jury that defendants entered into a conspiracy to secure allowance of a fraudulent claim against the bankrupt estate; that they manufactured and presented as genuine false invoices in favor of Belle and a false pretended contract between Jake and Belle; that each swore falsely in the bankruptcy proceedings, as charged in the respective counts, in support of the fraudulent claim. Of course, it was not necessary, in order to sustain the verdict, for the jury to make such broad findings. As to the substantive counts, it was essential only that the government prove the specific false oaths charged. The evidence amply supports a finding in that respect and meets fully the strict requirements of proof necessary to warrant a conviction for making false oath, even though we adhere to the harshness of that rule, despite the evident growing reluctance on the part of many courts to do so. We think it unnecessary to prolong this discussion. We merely add that other contentions of defendants are without merit.

Finding no error in the trial, the judgments as to all counts, other than the thirteenth, must be affirmed. The judgment on that count is reversed. In all other respects the judgments are affirmed

A true copy. Teste:

____ ____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit

Office - Supreme Court, U.
FILED
MAR 23 1953
HAROLD B. WILLEY, Clerk

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 685

J. H. MARACHOWSKY, ETC.,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM D. DONNELLY,
JOHN E. HARTSHORN,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, J. H. Marachowsky, prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on January 7, 1953, affirming on all counts but one the judgment of the United States District Court for the Western District of Wisconsin.

Opinions Below

The trial court filed no opinion. The opinion of the Court of Appeals (CAR. 12) is reported in 201 F. 2d 5.

It is reprinted in the Appendix to this Petition.[1]

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on January 7, 1953 (CAR. 12). Petition for rehearing was timely filed on January 22, 1953 (CAR. 15) and denied by order entered February 6, 1953 (CAR. 17). On February 28, 1953, Mr. Justice Minton entered order extending time for filing petition for writ of certiorari until March 28, 1953. The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254(1). See also Rule 37(b) of the Federal Rules of Criminal Procedure, promulgated February 8, 1946.

Questions Presented

1. Whether as a matter of law the evidence presented on behalf of the Government was sufficient to support a verdict of guilty as to Petitioner on each of the counts.

2. Whether summaries of books and records prepared by a Government accounting expert and purporting to show that all credits and debits to several accounts as they appear in corporation books of original entry were actually all to the single account of one individual are admissible in evidence where it appears that the summaries were based on an unauthenticated undated carbon memorandum of account as to which there was no showing that it was made in the regular course of business or contemporaneously and where books of account of the corporation pertinent to the con-

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[1] Because a printed record was dispensed with in the Court below, this petition will refer to the record as:

"CR", the Common Law Record in the trial court.

"Tr.", the Transcript of the Testimony.

"CAR", the record of the supplemental proceedings in the Court of Appeals.

"App'x", the opinion of the Court of Appeals reprinted as an appendix to this petition.

clusion in the summaries were neither consulted nor made available in court at any time.

3. Whether an accounting expert may testify orally to his opinion that three separate accounts appearing in the books of original entry of a corporation were really only one account where such opinion was based upon inadmissibie evidence and without regard to pertinent books of the corporation.

Statutes Involved

Title 18, U. S. C. provides:

> "Sec. 152. * * * Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or
>
> "Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt * * * shall be fined not more than $5,000 or imprisoned not more than five years or both."
>
> "Sec. 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 28, U. S. C., Sec. 1732(a) provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. * * *"

Statement

Petitioner, J. H. (Jake) Marachowsky, with Belle Marachowsky, was named defendant in an indictment June 29, 1951, containing 14 substantive counts and one conspiracy count (CR. 9-27). Each of the first seven even-numbered counts, 2, 4, 6, 8, 10, 12, and 14, inclusive, alleged that he made oaths in the bankruptcy proceedings of the Portage Wholesale Company in support of the amended claim of Belle Marachowsky for $126,780 filed against that estate (CR. 9-27) and in violation of 18 U. S. C. Sec. 152. The first seven odd-numbered counts, 1-13, inclusive, related to the co-defendant, Belle Marachowsky. The fifteenth count charged conspiracy by both to present a false claim against the debtor estate and to make false oaths in such proceedings in relation thereto (CR. 9-27).

The law of the case established by the instructions to the jury with respect to the substantive counts 2, 4, 6, 8, 10, and 12 was that, to convict of perjury, the jury must believe beyond a reasonable doubt the direct testimony of a witness and that there is other evidence corroborating the testimony of such witness and proving beyond a reasonable doubt that the defendant testified falsely with regard to this transaction (Tr. 2852, 2853, 2854, 2855).

With respect to Count 14, the trial court instructed that the jury must believe from the testimony of witnesses who identified available records of the company in evidence and on the basis of such records that the invoices (Exhibits 11-16) were not credited on the books of the company on or about December 23, 1946; and second, that there is other evidence corroborating such testimony and proving beyond a reasonable doubt that J. H. Marachowsky knowingly testified falsely with regard to the crediting of the invoices on the books of the company.

Verdicts of guilty on all counts were returned against the defendants (Tr. 2881-2882). The petitioner, J. H. Marachowsky, on each of the substantive counts against him was sentenced to five years, and on the conspiracy count to two years, all sentences to run concurrently, and on counts 2, 4, 6, 8 and 10 to pay fines of $5,000 each (Tr. 2901-2903). Co-defendant, Belle Marchowsky, was given a general sentence of two years and $10,000 fine (Tr. 2903-2904).

On appeal the Court of Appeals applied as the law of the case the same rule of law given in the instructions to the jury by the trial court. It stated (Appx., p. 9):

> "However, despite this growing drift toward substitution of a saner rule requiring only that the evidence be sufficient to prove guilt beyond all reasonable doubt, in view of the fact that the District Court adhered to the old precepts and in view of our conclusions, we shall do likewise in disposition of this appeal."

On appeal the Court of Appeals affirmed except that as to Count 13 against defendant Belle Marachowsky, it held the evidence insufficient as a matter of law. In all other respects the judgments of the trial court were affirmed (CAR. 13).

STATEMENT OF FACTS IN NO. 684 ADOPTED BY REFERENCE.—For brevity, the statement of facts set forth in Petition for Writ of Certiorari in the companion case of *Belle Marachowsky* v. *United States,* No. 684, is incorporated herein by reference.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that under the rule requiring one direct witness and corroborating evidence to convict of perjury—the law of this case—there was sufficient evidence to sustain

the verdicts against petitioner on the even-numbered counts of the indictment 2, 4, 6, 8, 10, 12, and 14.

2. In failing to hold that the evidence was insufficient as a matter of law to support the verdicts on the substantive counts.

3. In holding to be admissible in evidence accounting summaries prepared in reliance upon an unauthenticated and incompetent document as a record of the corporation, and without reference to books and records of the corporation pertinent to the conclusions to which the summary is addressed.

4. In holding that the general journal of the corporation was made available to defendants before the conclusion of the trial.

Reasons for Granting the Writ

Evaluation of the evidence against petitioner, having careful regard for the testimony alleged in the indictment to be false, raises grave doubt as to the adequacy of the evidence as a matter of law, to sustain the verdicts on the substantive counts.[2] Because of the relative paucity of the evidence against petitioner, the erroneous admission in evidence of the summaries and oral opinion of the Government accounting expert was highly prejudicial to petitioner.

1. The Court of Appeals in Approving the Admission of the Summaries and Expert Testimony of the Government Witness, Price, in Disregard of Well-recognized Rules of Evidence, Has Sanctioned a Departure by the Trial Court from the Usual Course of Judicial Proceedings.

In support of this reason for granting the writ petitioner adopts by reference and here urges the same facts and con-

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[2] This is highly important to petitioner since the sentences ordered to run concurrently on the substantive counts are each for 5 years.

siderations set forth in the petition for certiorari in *Belle Marachowsky* v. *United States*, No. 684, O. T. 1952, at pp. 27-38.

2. Under the Law of the Case the Evidence Against Petitioner Was Plainly Inadequate as a Matter of Law to Sustain Verdicts on the Substantive Counts.

A review of the record shows that of the testimony of the petitioner alleged in the several substantive counts of the indictment to be false, most is established by the Government's own evidence to be true. As to the balance, the evidence of the Government falls far short of the measure of proof required under the rule recognized by the courts below as applicable. The evidence with respect to each of the several substantive counts may be considered seriatim:

Figge Transaction

COUNT II

Count II of the indictment alleged that J. H. Marachowsky, on July 14, 1948, gave false testimony in regard to the transactions with the Kegley Creamery Company and one Frank Figge. Set forth as false were the following answers which have been numbered for reference:

"Q. And what was that item, if you recall?

[1] A. Well, that represented $33,000 which Belle had coming from the Portage Wholesale Company.

"Q. Now, you say, 'she had coming from the Portage Wholesale Company.' Had the credit gone to Portage Wholesale Company for that amount at the Home Savings Bank?

[2] A. Yes, it had. At that time it did, yes.

"Q. Well, the amount is actually $32,999.17, isn't it?

[3] A. Yes, that's right.

"Q. And did you agree with her that $20,000.00 of that—no, that 12,999.17 would go to Mauston service station?

[4] A. Yes, I did.

"Q. Was that a company with which you were affiliated in some way?

[5] A. Yes, yes.

"Q. And the 20,000 to Portage Wholesale Company, is that right?

[6] A. That is correct.

"Q. Now, was it your understanding that that was—that the 32,999.17 was her money?

[7] A. Yes, that was my understanding."

ANALYSIS OF EVIDENCE.—Answer [1] was not material. Reference to the proceedings before the Referee (Ex. 7, p. 351) shows that the allegations of the indictment omit the objection and ruling that immediately followed:

> "Mr. Bennett: That is objected to on the ground that it is pure conclusion, and is not a responsive answer to the question.
>
> The Referee: Objection sustained." (Ex. 7, p. 351).

Since this evidence was ruled out, it was not material to the issues, and was not considered by the Referee and cannot be made the basis of perjury. "* * * materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it."[3] *Blackmon* v. *United States*, 108 F. 2d 572, 573 (CCA 5, 1940).

Answer [2] and [3] were established as true by the Government's own evidence: a deposit slip showing a credit of $32,999.17 in the Home Savings Bank, Milwaukee, July 15, 1946, with the notation—"from the First National Bank in

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[3] Cf. *Carroll* v. *United States*, 16 F. 2d. 951, 953 (CCA 2, 1927); cert. denied 273 U. S. 763 (1927) (investigation by grand jury); *Woolley* v. *United States*, 97 F. 2d 258, 262 (CCA 9, 1939); cert. denied 305 U. S. 614 (1939) (investigation by SEC); *United States* v. *Goldstein*, 168 F. 2d. 666, 671, (CCA 2, 1948); (investigation by Special Agent of Treasury Dept.); *United States* v. *Moran*, 194 F. 2d. 623, 626 (CCA 2, 1952); (investigation by Senate Crime Investigating Committee); *Luse* v. *United States*, 64 F. 2d. 776, 777 (C.A. 9, 1933).

Sioux City, Iowa" (Ex. 314); a bank statement of Home Savings Bank showing credit of $32,999.17 to Portage Wholesale Company on July 15, 1946 (Ex. 48-A; Tr. 268-269.)

Answer [4] is uncontroverted. The testimony of J. H. Marachowsky that he so agreed with Belle Blitz is a matter impossible of contradiction except by her. Her testimony was that such agreement was made (Tr. 1715). There is no testimony by any witness to the contrary.

Answer [5] is uncontroverted. It is not disputed that J. H. Marachowsky was affiliated with the Mauston Service Station also known as A. M. Oil Company (See Tr. 220, 223, 1236, 1269).

Answer [6] is uncontroverted. The fact of agreement with Belle Blitz, as in Answer [4] could be contradicted only by her testimony on the matter which does not deny the agreement (Tr. 1715).

Answer [7] is the only answer under Count II on which the Government relied in the court below. The opinion of the Court of Appeals, while it deals at length with the evidence on this matter of the Figge "advances" (Appx. 9-11), is directed principally to the adequacy of the evidence as against Belle. The opinion identifies Figge as the "one witness contradicting the truth of her testimony". Without specificity as to Jake, the opinion merely generalizes its conclusion (Appx. 11):

> "Taken all together the proof includes the direct testimony of a witness and ample facts and circumstances corroborating the alleged falsity of the oaths of both Belle and Jake in the bankruptcy proceedings, in this respect."

Figge's is the only testimony of a direct witness that has at any time been suggested as bearing on this alleged false oath.

Since the answer [7] here involved, is testimony merely as to Jake's "understanding", it was possible to establish it as perjured only by testimony as to some overt act from which the jury might infer that the accused's actual state of mind was otherwise than as stated in the answer. *United States* v. *Remington*, 191 F. 2d 246, 249 (C. A. 2, 1951).

Figge testified that Olson told him that "he had a balance of $33,000" (Tr. 156), that "he had orders from the home office to settle up and not to ship any more butter, so, after checking our books, we found we owed him $33,000.00" (Tr. 158).

Olson testified that he had used cash received from Mrs. Blitz for the purchase of dairy products including some of the butter advances to Kegley Creamery and West Point Creamery (Tr. 2195-2196).

At the trial Jake verified that Olson had advanced Figge $33,000 of Belle's currency for the procurement of butter at his (Jake's) instruction without Belle's permission (Tr. 2262). While the Cash Receipts book and the Accounts Receivable ledger of the Portage Wholesale Company credited the $32,999.17 payment to Farmers Equity Creamery and not to Belle Blitz, there was no showing that this was done at Jake's direction.

While there may possibly have been some circumstantial evidence tending to negative that the $32,999.17 item represented money belonging to Belle, it fell short of showing an overt act by Jake controverting his "understanding" alleged as perjury. Furthermore, there was no testimoney of a direct or living witness as to any such overt acts.

Under the law of the case, as established by the courts below, and under the applicable decisions, the evidence was plainly inadequate to sustain a verdict of guilty on this count.

Spiritus Butter Transaction

Count IV

Count IV of the indictment alleged that J. H. Marachowsky on July 14, 1948, gave false testimony in regard to a transaction with Milton Spiritus involving a carload of butter. Set forth as false were the following answers which have been numbered for reference:

"Q. Well, what did you have to do with Belle in regard to this?

[1] A. Well, I didn't have the money to pay for the car in the Wholesale.

"Q. Where was the car?

[2] A. Originally it was somewhere in Nebraska, but it had already reached New York, and we weren't able to pay for it at Portage. It was shipped on a shipper's yellow bill of lading.

"Q. And that had to be picked up before the car could be released, is that it?

[3] A. That is correct.

"Q. And was that a car that went to Spiritus?

[4] A. It eventually did, yes.

* * * * * * *

"Q. You asked Belle to pay for it, did you not?

[5] A. Yes, I did.

"Q. And the car was released to Spiritus, was it not?

[6] A. Eventually, yes.

"Q. And when the Spiritus check came in, you credited that to Belle, is that right?

[7] A. Yes, I did."

Analysis of Evidence.—Answer [1] is verified by the Government's own exhibit, a bank statement of Portage Wholesale Company for the period (Ex. 48-A).

Answers [2], [3] and [4] are established as true by the Government's exhibits and testimony of Milton Spiritus, a Government witness (Ex. 115; Tr. 362, 518, 522, 1561).

As to answer [5] no evidence was adduced at the trial to establish that petitioner did not, as he stated, ask Belle Marachowsky to pay for the draft.

The truth of answer [6] was established by testimony of Government witness Spiritus (Tr. 363-364).

As to answer [7] the evidence was clear that the draft for $26,856.90 by the Farmers Equity Creamery covering Car No. SFRD 18,500 was paid (Tr. 522-523); that Spiritus did not pay the draft (Tr. 524, 535); that there is no record to show that Portage Wholesale, by draft or otherwise, paid Farmers Equity Creamery for the car of butter (Tr. 447, 1560). There was no suggestion or evidence that Joe Blitz paid the draft. On this state of the record, the Government conceded in the court below (Br., p. 69): "The record does not show who paid the draft on car No. SFRD 18,500".

The Government urged that Spiritus was the living witness contradicting Jake's testimony. The Government relies on Spiritus' testimony that he did no business with Belle and received no money from her. It is apparent that the contention confuses Jake's testimony with that of Belle. The testimony of Spiritus does not conflict with the testimony of Jake charged to be false. The Cash Receipts book of the Portage company shows that when the Spiritus check for $27,240.57 was received, it was credited to Spiritus (Ex. 50; Tr. 1238). The bookkeeper testified she was told to so credit the check by "either Jule or Jake Marachowsky".

There is plainly no evidence of any direct living witness to show that Jake did not credit the Spiritus payment to Belle as shown in the invoice signed by her and him (Ex. No. 12).

Spiritus Cheese Transaction

COUNT VI

Count VI of the indictment alleged that J. H. Marachowsky, on July 14, 1948, gave false testimony in regard to a transaction with Milton Spiritus involving a carload of cheese. Set forth as false were the following answers which have been numbered for reference:

"Q. How did that $10,000 credit arise on a Milton Spiritus account?

[1] A. Well, that was a very similar transaction, except that we had paid for this car, or part car of Edams, that is, the Portage Wholesale had paid for it; and I had shipped it out to Milton Spiritus on an arrival draft, and I had loaned, I think it was eleven thousand, one hundred and some dollars on it from the Home Savings Bank.

"Q. You mean you had gotten $11,000?

[2] A. 11,000, yes.

"Q. Credit?

[3] A. Credit, yes.

"Q. On your account there?

[4] A. Yes, that's correct. And when the car arrived in New York, the market was bad, so Mr. Spiritus said, and he didn't want to pick up the draft. So I asked Belle if she would advance the money, so that the car would be picked up, and save demurrage on it."

Analysis of Evidence.—On this transaction, the Government relied on Spiritus as the "living witness" to the falsity of Jake's testimony. In this transaction it was not questioned that the first three answers charged in the count were in accord with the evidence at the trial. Only answer [4] is asserted by the Government not to be true. As to Mr. Spiritus not wanting to pick up the draft, Spiritus himself verified Jake's testimony in answer [4] (Tr. 554, 562).

As to the balance of answer [4], the Government contended to be false the testimony:

> "So I asked Belle if she would advance the money, so that the car would be picked up, and save demurrage on it."

As to this, also, the Government relied on Spiritus as the living witness and particularly his testimony that he received no money from Belle. He testified that someone gave him the money to pay the draft, who, according to his books, was "J. Blitz" (Ex. 124; Tr. 380) but he had no independent recollection that Joe Blitz furnished the money other than his books (Tr. 569) and he did not keep the books (Tr. 548, 557). Joe Blitz could not remember the details of the transaction (Tr. 1080).

Here again the Government seeks to prove Jake guilty by testimony of Spiritus that conflicts with testimony in the proceedings before the referee, not by Jake but by Belle. Having invoked the conspiracy count to broaden the field of admissible evidence, the Government apparently considers this as converting all substantive counts into conspiracy counts. Obviously, Jake's challenged statement that he asked Belle to take up the draft is not proven false by testimony that she did not take it up or by further evidence of circumstances indicating that she did not participate in the transaction.

Reference to the opinion of the court below (App'x. 12, 13) shows that the opinion simply failed to consider the distinction between the allegedly perjured testimonies of the two defendants.

Brockelman Brothers Transaction

COUNT VIII

Count VIII charges that J. H. Marachowsky testified falsely in regard to an item of $26,179 that he believed

> "in substance that the invoice [Ex. No. 14] reflected a credit that J. H. Marachowsky understood was Belle Canel's when he had the company's records before him."

No specific questions and answers from the hearing before the referee are set forth in this count in the Indictment. It alleges merely that petitioner's testimony as to his understanding was false and known by him to be false because:

> "In fact the said amount was remitted by Brockelman Brothers to Portage Wholesale Company in payment of their obligation for merchandise purchased from Portage Wholesale Company . . ."

ANALYSIS OF EVIDENCE—The Government, for its "living witness" relies on the testimony of Harry H. Robinson as contradicting Jake's statement that the invoice of Belle dated September 14, 1946, for $26,179 represented a credit that he understood was Belle's at the time he had the records of the company before him.

Robinson testified he never had any acquaintance with Belle and had all his transactions with the Marachowskys (Tr. 1146, 1148), but in deposition he had earlier testified that when he was trying to get the cars of dextrose and syrup, subject of the transaction, one of the Marachowskys stated (Tr. 1220-1221):

> "that corn had gone up from a low figure to a high figure but that they would have an associate see to it that they made delivery, or somebody out there made delivery. So, right following that, they sent our order."

Robinson reaffirmed this testimony at the trial (Tr. 1221).

Here again the only direct contradiction by Robinson's testimony was directed at the allegedly false testimony of Belle, not at that of Jake.

No witness refuted the statement of petitioner. An examination of the Cash Receipts book discloses that the item was credited to Blitz Products Company (Ex. 50, p. 30).

The Government argued strongly that the actual posting was on the account sheet of Joe Blitz (Ex. 54-54A). The falsity of this contention, of course, turns upon the consideration as to the authenticity of Exhibit 54-54A and the admissibility of the summaries (Exhibits 317, 318), more fully discussed in the second reason for granting the writ contained in the petition in the companion case and adopted by reference herein. It is also to be noted that within a few months of the time that J. H. Marachowsky last had the records before him, December 1946, the former accounting officer for the company, Goetz, examined the same records and also reached the conclusion, approved by independent auditors, that Blitz Products Company was the proper account to be credited with this item (Ex. 204, 205, Schedule A6).

In the absence of a living witness directly contesting the challenged testimony of Jake, circumstantial evidence, no matter how strong its effect might be as corroboration, is inadequate to sustain the count under the law of the case.

Morrison Transaction

COUNT X

Count X of the indictment alleged that J. H. Marachowsky, on July 14, 1948, gave false testimony in regard to a transaction with one William Morrison involving a tank

car of syrup. Set forth as false were the following answers which have been numbered for reference:

"Q. And was that money that was due Belle Blitz?
[1] A. Yes, it was.
"Q. But money that had been credited to your account at the Home savings Bank, is that right?
[2] A. That is correct.
"Q. Pursuant to arrangement that you had with her?
[3] A. That is correct.

* * * * * * *

"Q. Now, was that also money that was due to her?
[4] A. Yes."

Analysis of Evidence—The Government here relies on William Morrison who did business as Peak Products Sales Company as the "living witness" (Tr. 708). He testified that in August 1946 he ordered a car of corn syrup from one of the Marachowskys and that car GATX 24419 was delivered to him in New York and that he paid for it by check in the amount of $13,648 (Tr. 710) to the Manufacturers Trust Company to pay a draft there presented for payment (Tr. 711). Exhibit 127 is a debit memorandum from the bank for "Wire charge for credit of $13,648 to account Portage Wholesale Company" (Tr. 711). He was acquainted with Belle Blitz (Tr. 711) but had no business dealings with her (Tr. 712) and she did not sell him any merchandise (Tr. 714).

Plainly, Morrison's testimony does not contradict the testimony of Marachowsky that the money credited at the Home Savings Bank was money due Belle Blitz. Morrison did not purport to know anything about the relations between Portage Wholesale Company or Jake Marachowsky and Belle Blitz (Tr. 737).

Answer [2] is shown to be correct by the entry in the Cash Receipts book (Ex. 50, p. 25) showing under August 26, 1946, a debit to Home Savings Bank of $13,648.00.

Morrison admitted that he had no recollection with whom he had talked over the telephone in ordering the car (Tr. 724).

It follows that there was no direct testimony by a living witness to demonstrate that answers [1], [3] and [4] were false.

Evidence that the Portage Wholesale Company had paid the draft of the American Maize Company on August 19, 1946, in the amount of $5,140.61 (Tr. 275, 329, 1568) and that the car was invoiced to the Joe Blitz Corn Account (Tr. 1568), as well as other memoranda and correspondence with Joe about the car (Tr. 1008; Ex. 140, 142) might be regarded as circumstantial evidence, but in the absence of the "living witness" under the law of the case, is insufficient as a matter of law and is offset in probative effect by the fact that the remittance on the draft paid by Morrison, when received by Portage Wholesale was credited under date of August 26, 1946, to outside receivables, "Blitz Products Company" (Ex. 50, p. 25).

Monarch Wine Transaction

COUNT XII

Count XII of the Indictment charges that J. H. Marachowsky gave false testimony with respect to an invoice purporting to show a charge by Belle Blitz (Canel) to Portage Wholesale Company of $16,500 and offered by Belle Canel to support her claim, and material to said claim,

> "in substance that the invoice reflected a credit that J. H. Marachowsky understood was Belle Canel's when he had the Company records before him."

Analysis of Evidence.—The Government here relies on the testimony of Samuel J. Sens (often known as Simms) (Tr. 758) as that of the required living witness to establish the

falsity of Jake's testimony that the invoice (Ex. 16) with respect to this transaction reflected a credit that Jake understood was Belle Canel's. Sens merely testified that he purchased from Portage Wholesale, and had that company send to him, care of Peak Products, certain merchandise in 1946 (Tr. 759); that he had not known Belle Blitz (Tr. 762) and that as Belle Canel, Belle Blitz, or Belle Marachowsky, she had never to his knowledge sold him $16,500 worth of merchandise (Tr. 761). As must have been obvious in any event, he testified expressly that he had no knowledge of his own as to any arrangements that Mrs. Blitz had with Portage Wholesale Company (Tr. 775).

There was evidence that a sight draft covering Car B & O 265,476, drawn by the American Maize Products Company on the Portage Wholesale Company at the City Bank of Portage in the amount of $7,285.32 was paid on August 27, 1946 (Ex. 80; Tr. 279, 281 H);[4] that on August 31 the car was invoiced to Joe Blitz Corn Account at $7,735.32 (Ex. 83) and that the Portage Wholesale Company borrowed on a new draft and bill of lading in the amount of $16,500 which was credited to Blitz Products Company on August 28 (Ex. 50, p. 26); the bill of lading was endorsed "Blitz Products Co. S. Krueger" (Tr. 2459-60). A memorandum from Jake to Joe Blitz listed the price of the car at $16,500 (Ex. 156). It also appeared that Morrison who worked with Sens, sold the car to Monarch Wine Company (Tr. 714) and the draft, drawn on Peak Products (Ex. 129) was paid by check of the Monarch Wine Company at the Manufacturers Trust Company in Brooklyn, New York (Tr. 347).

Of this evidence, the court below holds (App'x. 15):

> "Sens testified he did not know Belle; that he dealt only with Jake and Jule Marachowsky and had no

[4] Pages subsequent to 281 are erroneously numbered in the transcript as 272-281, and for clarity have been renumbered as 281A-281J, inclusive.

transactions with Belle. His testimony of the *falsity of the defendants'* [sic] *sworn statements* was corroborated by the foregoing circumstances, and others, including Belle's own previous inconsistent acts and statements, the bank records and those of Peak Products." (Emphasis supplied).

This holding that the living witness's testimony demonstrated falsity of Jake's sworn statement has no more validity than the similar holding with respect to Counts VI, VIII and X. It would be ridiculous if it were not so deadly serious for the man who must serve a five-year sentence on the basis of it. If the testimony of Sens be regarded as directly contradicting or showing an overt act inconsistent with Jake's sworn statement that he understood that Belle Canel had a credit in the amount of the invoice, then the strict requirements as to the quality of evidence necessary to sustain a perjury count have been completely destroyed. Obviously, a merchant who testifies that moneys received from the sale of goods represent a credit or obligation to his financing banker could be proved a perjurer by testimony of the merchant's customer as a "living witness" that he never heard of or dealt with the banker.

Handwritten Invoices

COUNT XIV

Count XIV of the indictment alleged that J. H. Marachowsky, on July 14, 1948, gave false testimony with respect to the invoices referred to in Counts II, IV, VI, VIII, X, and XII. Set forth as false were the following answers which have been numbered for reference:

"Q. Do you know if they were ever credited on the books of the company?

[1] A. Well, I think they were, yes.

"Q. Did you, yourself, make any investigation to see whether there was any entry made in the company's books relating to the transactions shown on these exhibits?

[2] A. Well, I think on December 23rd I had the sheets before me, and the entries were there."

The Court in its analysis of the evidence with respect to this point placed heavy reliance on the testimony of the three bookkeepers that none of the invoices involved appeared in the Cash Receipts Book, the ledger sheets, the General Journal and the general ledger and that none of the three had ever seen or heard of the invoices.

All of the entries referred to in Count XIV were set forth in Exhibit 323 in the handwriting of J. H. Marachowsky and delivered to Belle by him in December 1946 (Tr. 713).

The Government places emphasis on the fact that at no time in 1946 according to the testimony of Goetz did these exhibits appear as owing on the Accounts Payable (Tr. 250).

However, Goetz did not have immediate charge of the Accounts Payable.

The argument of the Government is analogous in that it places emphasis on the absence of the invoices from their regular place for filing in the invoice file.

Yet the Government, under Count II of the Indictment, relies very heavily on an asserted account of Portage Wholesale with Figge, doing business as Kegley Creamery and West Point Creamery, including credit balances for butter received. But with respect to that account it is conceded that there were no invoices available to show that any merchandise had ever been received from West Point Creamery or Kegley Creamery (Tr. 1547, 1559). There was no Kegley Creamery account in the Accounts Receivable (Tr. 1289, 1299); there was no Figge account in the Accounts Receivable, or the Accounts Payable (Tr. 1290, 1299).

Contrary to the Government's attempt to show that Exhibits 11-16 had never been seen, Jule Marachowsky on cross examination said (Tr. 1460):

> "Q. Now you don't deny that you ever saw those [Exhibits 11-16], do you?
> A. I couldn't deny that. I have seen them."

The bookkeeper, Rosemary Cook, conceded that sometimes there was no invoice for merchandise (Tr. 1400).

Jule Marachowsky also testified (Tr. 1460) that it would be possible that some of the papers of the company were in various desks in the office and that it was customary and usual procedure to have people keep papers in their desks.

There was no showing that the bookkeepers who said they did not recall seeing the questioned invoices in the files had been looking for them. The weakness of this testimony because of its negative nature is well established.

It is submitted that the Government's evidence under Count XIV plainly fell short of that requisite under the law of the case.

Conclusion

It is respectfully submitted that Writ of Certiorari should be granted.

WILLIAM D. DONNELLY,
JOHN E. HARTSHORN,
Counsel for Petitioner.

March 1953.

CUMMINGS, STANLEY, TRUITT & CROSS,
Of Counsel.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM AND SESSION, 1952

Nos. 10540 and 10541

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

BELLE MARACHOWSKY, etc., and J. H. MARACHOWSHY, etc., *Defendants-Appellants*

Appeals from the United States District Court for the Western District of Wisconsin

January 7, 1953

Before Major, Chief Judge, Kerner[1] and Lindley, Circuit Judges

LINDLEY, *Circuit Judge:*

Defendants, indicted in fourteen counts charging the making of false oaths in a bankruptcy proceeding and in one, the 15th, with conspiracy, having been found guilty and sentenced, perfected this appeal. They are man and wife. It should be observed, however, in order to avoid confusion, that Belle Marachowsky's maiden name was Canel; that she married Joseph Blitz, divorced him and resumed her maiden name, and, later, married Jake Marachowsky.

Counts 1, 3, 5, 7, 9, 11 and 13 charged Belle Marachowsky with making false oaths in the bankruptcy proceedings of the Portage Wholesale Company in support of her amended claim for $126,780.09 filed against that estate. Counts 2, 4, 6, 8, 10, 12 and 14 charged false oaths upon the part of Jake Marachowsky in the same proceeding in support of

[1] Judge Kerner participated in the consideration and disposition of this case but died before the formal opinion was announced.

Belle Marachowsky's claim. Count 15, as we have observed, charged conspiracy by both to present a false claim against the debtor estate and to make false oaths in such proceeding in relation thereto. Belle Marachowsky was sentenced to two years in the custody of the Attorney General and to pay a fine of $10,000. Jake Marachowsky, upon each of the substantive counts, was sentenced to five years in the custody of the Attorney General, all the sentences to run concurrently. Upon counts 2, 4, 6, 8 and 10, he was fined the sum of $5,000 each, or $25,000 in all. On the 15th count he was sentenced to two years in the custody of the Attorney General, to run concurrently with the other sentences.

Upon appeal defendants urge that the evidence adduced by the government was not sufficient to meet the requirements abiding in prosecutions for taking false oaths; that the court should have allowed their motions for acquittal, and that the court committed certain prejudicial errors. In view of the first mentioned contention, it becomes necessary to examine, somewhat in detail, the evidence submitted by the government.

Among the salient facts as established by the evidence viewed in its aspects most favorable to the government are the following. The Portage Wholesale Company was a corporation doing business in Portage, Wisconsin, of which the defendant, Jake Marachowsky, owner of 52 per cent of the capital stock, was president and manager; associated with him was his brother Jule. The company was engaged in buying and selling butter, cheese, corn, syrup, dextrose and other food products during the years 1945 and 1946, while price control was in effect. It bought merchandise apparently within controlled prices and disposed of the same on the black market at sharply increased over-ceiling prices.

Preceding those years Joe Blitz and defendant Belle Marachowsky, then Belle Blitz, lived at Chippewa Falls, Wisconsin. In December, 1944, they came to Portage where Joe was employed by the company. He remained there, however, only a short time, after which he proceeded to New York, where he acted as agent of the company, selling the products in eastern territory. Very frequently the

larger part of his sales prices was received in currency and placed in envelopes which, from time to time, he and his wife carried from New York back to Portage. Blitz received his instructions from Jake Marachowsky by letters and unsigned typewritten memoranda. Many of these instructed Joe to get from 15 to 16 cents per pound for corn syrup and 18 to 19 cents per pound for dextrose, at a time when the legal maximum price was 5 cents and 7 cents respectively. Frequently cars of merchandise were shipped on open bill of lading consigned to Blitz, who received and delivered the bill of lading to others, collecting the sales price fixed as aforesaid. If a car was shipped with draft attached to the bill of lading, Joe would pay the draft with cash received from selling the company's products and then sell the car. He was employed on a commission basis; the company always owned the merchandise and never sold it to him.

One John Olson was, during the year 1946, employed by the company to purchase products in Iowa and Nebraska. Jake supplied Olson with signed checks of the company which Olson filled in and used in making purchases. Olson also received from the company, cash aggregating some $75,000, which he used in buying products for the company. Olson received all his instructions from Jake and none from Belle, although at Jake's request he was handed money by Belle in envelopes, for which he accounted to the company. He was working for the Portage Wholesale Company and considered Belle its agent.

Price ceilings terminating on June 30, 1946 were never renewed, so far as corn was concerned, but were placed in force once more on corn syrup and dextrose after July 25, 1946. The company paid Burbridge of Omaha a finder's fee for corn, which, before ceilings were removed, was $200 per car and thereafter $100 per car. This firm dealt with Jake and Olson, never with Belle. This corn was shipped from Nebraska and Iowa to brokers in Chicago on sight draft. The brokers paid the drafts and delivered the corn to the refinery, American Maize Products Company. If the market price dropped while the goods were in transit, the drafts were reduced and the company paid the difference to the elevator which had supplied the corn.

For every six cars of corn so made available to American Maize, the Portage Wholesale Company was permitted to buy from the refinery one car of dextrose, or two cars of corn syrup, which were then shipped to Portage with draft attached. The company paid for them and reshipped them, invoicing them to Blitz in New York within the ceiling price, who then sold them at prices suggested by Jake Marchowsky, in excess of ceilings.

Despite the volume of business transacted, the company apparently found itself without funds in January, 1947, when it filed a petition for arrangement under Chapter XI of the Bankruptcy Act.

About a week before the debtor proceeding was instituted, Belle brought suit against the company for some $36,000 which she claimed to have loaned to it. At about the same time, Joe Blitz commenced divorce proceedings against Belle who, on adverse examination, testified that this $36,000 was all the company owed her. However, in August, 1947, she filed claim against the debtor for $67,926.06. On October 14, 1947, she was divorced from Blitz and resumed her maiden name, Canel. On October 20, 1947 she filed a bill of particulars of her claim in which she said that no notes or other written evidence existed to support her demand except certain checks listed therein. On March 22, 1948, at an adverse examination, Belle produced, for the first time, a series of invoices, known as Exhibits 11 to 16 inclusive, partly in Jake's handwriting and partly in Belle's, purporting to have been prepared in 1946. No one had ever seen these invoices before March 22, 1948 except Jake and herself. The circumstances appearing in the record fully support the government's contention that they were fraudulently manufactured solely to support Belle's claim.

Some three months later she filed an amended claim for $126,780.09. At a hearing in July and August, 1948, before the referee, Belle and Jake gave the testimony charged in the indictment to have been false. The company was ultimately adjudicated bankrupt and claims against it can not be paid in full. In November, 1948, Belle and Jake were married.

With this sketchy picture in mind, we divert our discus-

sion for the time being to the statute and the authorities. The wording, "knowingly and fraudulently makes a false oath" in a bankruptcy matter, is that of the revised criminal code, Title 18, Sec. 152, superseding a similar provision in the Bankruptcy Act, Sec. 52, Title 11 U. S. C. (1940 Ed.), in effect removing the latter entirely from the Bankruptcy Act but including it in the revised code, under Chapter 9 as a part of "Offenses under the Bankruptcy Act." Consequently, the perjury statute, 18 U. S. C. Sec. 1621 is not involved here, previously Title 18 U. S. C. (1946 Ed.) Sec. 231. One accused of false swearing in a bankruptcy proceeding was punishable under either former Sec. 52 of Title 11 or the general perjury statute, the punishment only under Sec. 52 being different. *Epstein* v. *U. S.*, 196 Fed. 354 (C. A. 7).

Various decisions have from time to time indicated that there is a legal difference between the crime of a false oath in bankruptcy proceedings and perjury. This Court, in *Goetz* v. *U. S.*, 59 F. 2d 511, in reviewing a conviction under the earlier provision of the Bankruptcy Act, similar in all ways to the present one, said: "Appellant seeks to interpret each count of the indictment in the light of the statute and decisions relating to perjury, and they are not applicable to the instant case." Recently, Judge Kerner, speaking for the court, in *U. S.* v. *Lynch*, 180 F. 2d 696, said, at 701: "But this court has held that proof of false oath in bankruptcy need not contain all of the elements of perjury." In *Weschler* v. *U. S.*, 158 Fed. 579 (C. A. 2), the court held that the bankruptcy provision did not create a new offense but merely prescribes a different penalty for the crime of perjury already defined by Congress, when committed in or in relation to bankruptcy proceedings. And in *Schonfeld* v. *U. S.*, 277 Fed. 934 (C. A. 2), the same court said: "False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. *Kahn* v. *U. S.*, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing. *Kahn* v.

U. S., supra." By retaining the same wording, in the revised criminal code, it may well be urged that Congress tacitly approved the interpretations of such words by the courts under the previous statute. *Morris Plan Ind. Bank* v. *Finn,* 149 F. 2d 591 (C. A. 2). However, other decisions refuse to distinguish between the two crimes. In view of our conclusions, it is not necessary that we ground our decision upon any possible distinction between the two offenses.

In view of the uniqueness of the rule commonly held applicable in perjury cases, we think it well to refer to judicial discussions of this procedural standard. *U. S.* v. *Woods,* 39 U. S. (14 Pet.) 430, contains a resume of the common-law rule and the relaxations recognized at the time of that decision (1840). That case involved a statute forbidding false oaths by an importer. Specifically the court said: "We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule. * * * if it shall be seen, that the fact to be proved is an act of the defendant, which, from its nature, can be concealed from all others except him whose cooperation was necessary before the act could be complete, then the admissions and declarations by the defendants, either in writing or to others, in relation to the act, become evidence. It is no longer a question of the quality but of the quantity of evidence," and concluded that "in order to convict the defendant of the crime charged in the indictment, it is not necessary on the part of the prosecution to produce a living witness; if the jury shall believe the evidence from the written testimony sufficient to establish the charge that the defendant made a false and corrupt oath as to the cost of the goods imported * * *."

In *Hammer* v. *U. S.,* 271 U. S. 620 at 621, the language is "That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in *United States* v. *Wood,* 14 Pet. 430, 443. That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as

perjury, does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly in some cases documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony."

In *United States* v. *Buckner*, 118 F. 2d 468 (C. A. 2) at 469, the court said: "* * * the repeated admissions of the defendant that her testimony before the grand jury was false was a fair substitute for the confirmatory testimony which is generally required in perjury cases." The court continued: "In *United States* v. *Wood*, 14 Pet. 430, 439, 441, 10 L. Ed. 527, * * * The Supreme Court held that even a single witness to the *corpus delicti* is unnecessary when the truth of statements alleged to be perjured is 'directly disproved by documentary or written testimony springing from [the defendant] himself, with circumstances showing the corrupt intent. * * *' In that action the defendant's own invoice book and letters contradicted the oath which was set forth in his so-called 'importer's oath'. These papers were held sufficient proof to justify submission of the case to the jury although no witness of the *corpus delicti* was produced."

In *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2), where no witness testified as to the falsity charged and the proof was entirely circumstantial, the court said, at 249: "But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated.[7] This distinction was laid down in *United States* v. *Wood*, 14 Pet. 430, 10 L. Ed. 527, which has been often followed.[8] Since only written declarations will suffice, it follows that if the critical issue must be proved by 'direct' evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited

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"[7] We lay to one side a possible exception as to contradictory oral declarations made by the accused under oath, as the case at bar involves no declarations of this character. See Wigmore, Evidence, 3rd ed., Sec. 2043."

"[8] *Clayton* v. *United States*, 4 Cir., 284 F. 537, 540; *Phair* v. *United States*, 3 Cir., 60 F. 2d 953, 954; *Hart* v. *United States*, 9 Cir., 131 F. 2d 59, 61; *Fotie* v. *United States*, 8 Cir., 137 F. 2d 831, 840. Compare *United States* v. *Harris*, 311 U. S. 292, 61 S. Ct. 217, 85 L. Ed. 196."

to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by 'direct' evidence. And this view is confirmed by Chief Justice Vinson's opinion in *American Communications Ass'n.* v. *Douds,* 339 U. S. 382, 411, 70 S. Ct. 674, 690, 94 L. Ed. 925, where it is said: '* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much "overt acts" as the act of joining the Communist Party, there can be no successful prosecution for false swearing.' "

In *Kahn* v. *U. S.,* 214 Fed. 54 (C. A. 2), after commenting that a prosecution under the earlier Bankruptcy Act (Act of July 1, 1898, Sec. 29, sub. "n" (2)) evidently was regarded by Congress as not equal in degree to the crime of perjury, the court continued: "If this view of the situation be correct it is manifest that the burden of proof in perjury cases is not necessarily applicable here," but added "However, the ancient rule * * * has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt." After citing and commenting on certain decisions, including *U. S.* v. *Wood,* 39 U. S. (14 Pet.) 430, the court concluded: "Without pursuing the subject further we think that the ancient rule has become inapplicable to modern conditions and has been relaxed to such an extent that evidence which not only contradicts the testimony of the defendant but so far preponderates as to justify the jury in finding that the latter was not only false but was made by the defendant knowingly and fraudulently is all that is required to prove a crime under 29b(2) of the Bankruptcy Act."

Concerning corroboration, the third circuit in *United States* v. *Margolis,* 138 F. 2d 1002, said at 1003: "In *United States* v. *Palese,* 3 Cir., 133 F. 2d 600, 603, 604, we held that a conviction could be sustained if competent evidence

corroborated the falsity of the oath and that particular circumstances which indicated its falsity need not be corroborated." In *United States* v. *Palese,* 133 F. 2d 600 (C. A. 3), after concluding that it would adhere to the rule requiring at least one living witness and corroboration, the court added that the rule had been subjected to much "well reasoned criticism" citing 7 Wigmore on Evidence, 3rd Ed. §§ 2040-2043; *Marvel* v. *State,* 1925, 33 Del. 110, 3 W. W. Harr. 110, 131 A. 317, 42 A. L. R. 1058, and continued: "Thus, in *Goins* v. *United States,* 4 Cir., 1938, 99 F. 2d 147, 149, the court said: 'It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes. * * * The old "oath against oath" reasoning of the earlier decisions is without force now that the defendant is allowed to take the stand and that corroboration sufficient to satisfy the jury of the falsity of the oath may well arise from his demeanor and manner of testifying.'" In *State* v. *Storey,* 148 Minn. 398, 182 N. W. 613, 15 A. L. R. 629, the court pointed out forcibly that it is inconsistent to hold that evidence which is of the quality sufficient to hang a man for murder is insufficient to convict him of perjury.

Thus it seems apparent that the tendency has been to relax the rule governing the strictness of proof required in perjury cases and that, only with obvious reluctance, have the courts adhered to the harsh postulate which requires in a perjury case a greater degree of proof than in a murder case. However, despite this growing drift toward substitution of a saner rule requiring only that the evidence be sufficient to prove guilt beyond all reasonable doubt, in view of the fact that the District Court adhered to the old precepts and in view of our conclusions, we shall do likewise in disposition of this appeal.

Counts 1 and 2 specifically respectively charge Belle and Jake with false oaths with reference to a transaction with one Frank Figge upon which a part of her claim was based. Belle's testimony was that $32,999.17, which came to Portage Wholesale Company from Figge was hers; that she had given it to Figge partially personally and partially

through Olson. Jake's allegedly false oath in this respect was that he understood this money to be Belle's.

The evidence adduced by the government bearing upon the issue of falsity of these statements was that Figge met Olson, a representative of Portage Wholesale Company, who was in search of butter for the company, in 1946 in Omaha and sold him butter; that, later in the year, Figge bought an additional creamery and needed capital to finance the purchase; that Olson agreed that the company would advance him money for butter and eventually filled in blank checks of the wholesale company, signed by Jake as president and handed by him to Olson, who delivered them to Figge, totalling $99,384.10. Certain deliveries were made to the company resulting, in July, in a balance due from Figge to Portage Wholesale Company, on account of over-payment to him, of $33,000. For this Figge wrote a check to the company and delivered it to Olson, who later returned it to Figge, saying that Jake wanted cash. On July 12, Figge had his bank wire the $33,000 less charges, to Home Savings Bank, Milwaukee, for the credit of Portage Wholesale Company. On the company's books the payment was, apparently by mistake, credited to another creamery in Nebraska and remained so credited at the time the company filed its proceeding in the bankruptcy court. Jake told the company accountant that this sum was due Portage Wholesale Company for money advanced for butter not delivered. When the receiver was appointed, Jake made no claim that the money did not belong to the company or that Belle had any interest in it.

The material issue on these counts, then, was as to whether the $33,000 was money which Belle had paid to Figge as she swore before the referee. Figge testified that he had met Belle once or twice, but that he never had any business transactions with her, and never received from her any money, any letter, telegram or other communication, as she had testified. Here was direct testimony by one witness contradicting the truth of her testimony, in compliance with the requirements of the more strict rules governing proof of false oaths.

The corroborating evidence is that above related and,

in addition, that on April 11, 1947, Belle had testified, in other litigation, that the debt due her from Portage Wholesale Company was $36,000 for money she had loaned that company in cash and by check; that the company owed her for nothing more, though she later swore in the bankruptcy court that the company owed her over $126,000. Her further acts, relied upon by the government as inconsistent with her sworn testimony and corroborative of the testimony of Figge as to the falsity of her statement that she had advanced him almost $100,000, despite her admission in 1947 that the company owed her only $36,000, are that, in addition, she first swore in the bankruptcy court that the company owed her $67,926; and, later, that it owed her $126,000. In her claim she swore that no written evidence existed to support it except certain specified checks; yet, in 1948, in the bankruptcy proceeding, she produced, to support her claim, six invoices, partly in her handwriting and partly in that of Jake, purporting to have been in existence since 1946, at the time when she sued for $36,000 and swore that was all the company owed her, and at the time when she made oath that no written evidence of her debt existed. Yet these written invoices purported to show the entire finally claimed debt. Further corroboration of Figge's testimony showing the falsity of Belle's claim that she gave the money to him lies in the fact that the company's checks to Figge, totalling $99,384.10 showed payment by the company to Figge. Many other corroborating circumstances appear in the record. Taken all together the proof includes the direct testimony of a witness and ample facts and circumstances corroborating the alleged falsity of the oaths of both Belle and Jake in the bankruptcy proceedings, in this respect.

In counts 3 and 4 it was charged that both Jake and Belle made false oaths before the referee in that Belle testified that while she was in New York, Jake telephoned her directing her to give one Spiritus the money necessary to take up a sight-draft accompanying a bill of lading for a car of butter shipped to New York; that she gave Spiritus $27,240.57 in currency for that purpose, and that later Spiritus repaid Portage Wholesale Company for her credit. Jake swore that when the car reached New York, the company did not have the money to take up the draft; that he asked Belle

to advance it; that after Spiritus took up the draft and secured release of the car, he, Spiritus, remitted to Portage Wholesale Company and that when the payment came in, he credited it to Belle.

The evidence adduced by the government was that the car was shipped from a creamery in Nebraska consigned to Portage Wholesale Company, care of Joe Blitz, New York. When notice of the shipment came to the company, c/o of Blitz, the latter notified Spiritus, who had ordered the butter from the company. Someone other than Spiritus paid the draft, but he received an invoice for the car from the company and mailed to the company his check for the purchase price. On the company books, the face amount of the invoice was charged to Spiritus and the payment credited to him. Spiritus testified that he never had any transactions with Belle; that he never received any money from her; that she never discussed with him any of the transactions he had with Portage Wholesale Company with whom alone he dealt and to whom he remitted payment.

Thus we have the direct testimony of Spiritus that the oaths of Belle and Jake in the bankruptcy proceedings were false and corroborating evidence of that falsity in the circumstances above related, and in the further circumstances that Spiritus' records reflected no receipts of money by him from Belle to pay the draft. He received his invoice from the company and made payment to the company by check. The records of the company show a credit of the remittance to Spiritus and not to Belle; this credit remains in the records. The draft was for $26,856.90, whereas Spiritus' payment to the company was $27,240.57. The lately discovered invoice, Exhibit 12, purporting to credit the payment to Belle, shows payment of the draft to have been $27,240 whereas it was, in fact, only $26,856.90. Furthermore there was other evidence in various circumstances fully warranting the jury in believing that the testimony of each defendant in this connection before the referee was false.

Counts 5 and 6 charge that Belle swore falsely before the referee that Jake called her by telephone, asking her to give Spiritus the money with which to get released a car of cheese; that she gave Spiritus $11,147 to pick up

the draft but that Spiritus remitted only $10,000, because the market had dropped. The charge is further that Jake swore falsely that he asked Belle to take up the draft.

This car of cheese was shipped to North Egg Company, c/o Joe Blitz, New York; for it the Portage Wholesale Company drew a draft on North Egg Company, c/o Joe Blitz, in the amount of $11,160.71. Spiritus' checks aggregated $11,158.21. Two days later he remitted by check to Portage Wholesale Company $10,000, who received it and credited it to Spiritus' account. Spiritus testified that he received no money from Belle and never had any transactions or communications with her. Again the falsity of the oaths was corroborated by the circumstances previously related and others in evidence.

In counts 7 and 8 it is charged that Belle swore falsely before the referee that two certain cars of sugar and one of dextrose belonged to her; that she shipped them to Brockelman Brothers, Worcester, Mass., that they were bought from her by one Harry Robinson; that Brockelman Brothers remitted $26,179, their purchase price, to Portage Wholesale Company, and that Robinson also paid her $11,000 or $12,000 in currency; that this was her money. Jake testified that Belle was, as he understood it, entitled to credit for the $26,179.

These cars were shipped by American Maize Company to Portage Wholesale Company. Upon arrival, the consignee paid the draft in the sum of $11,519.47 by its checks. The company then shipped the cars to Brockelman Brothers, invoiced to J. Blitz. Portage Wholesale Company telegraphed Brockelman Brothers for an advance on the cars of $26,000 and at the request of Brockelman Brothers, the latter's bank telegraphed $26,179 to Portage Wholesale Company, who credited the payment to the account of Blitz Products Company, but posted it to the account of Joe Blitz.

Robinson, who acted for Brockelman Brothers, testified that he did not know Belle; that he dealt only with Jake and Jule Marachowsky and that he never had any transactions with Belle or paid her any money. Exhibit 14, another of the lately discovered exhibits purports to invoice a sale of the three cars to Belle. No record of such an invoice appeared anywhere in the sales invoices of the com-

pany. Morrison testified, further, that, after bankruptcy intervened, Jake, while in Worcester, told him that some question had arisen about sugar, and asked him, if he should be questioned about it, to state that he bought it from a subsidiary or some company other than Portage Wholesale Company, and that he told Jake that he would have to stand on the record.

We have referred to Belle's many statements and acts inconsistent with her testimony which tend to corroborate the falsity of her testimony before the referee in this respect also. Ample further corroboration is found in other circumstances in evidence.

Counts 9 and 10 relate to a transaction with Morrison doing business as Peak Products Company. Belle made oath before the referee that she sold a tank car of syrup to Morrison for $13,648, who remitted that amount to Portage Wholesale Company. Jake swore that this sum was due Belle. Both statements were alleged to be false. This car was shipped by American Maize Company to Portage Wholesale Company with draft attached to bill of lading. Portage Wholesale Company paid the draft for $5140.61 and, the next day, invoiced it to "Joe Blitz Corn Account" at $5607.28. Morrison had ordered the car from Portage Wholesale Company and gave his check for $13,-648 to his bank in New York, who then wired the remittance to the credit of Portage Wholesale Company. Morrison testified that he never met or knew Belle before he saw her in the bankruptcy court; that he never had any transactions or communications with her; that he never bought anything from her; that he ordered the car of syrup from Portage Wholesale Company, and knew no one else in the transaction.

Again it is obvious that a witness testified directly and certainly to the falsity of the sworn statements of both defendants in this respect. The attending circumstances are fully corroborative, including the pencil note from Jake to Joe Blitz, listing the car at 16 cents a pound, the remittance to the company, and other facts and circumstances in evidence.

In counts 11 and 12 it is charged, in the first, that Belle swore falsely that she sold a car of dextrose to Jack Sims

for $16,500; that she saw him in New York and directed him to send the money to Portage Wholesale Company; in the second, that Jake made false oath that this was Belle's money.

This car was shipped by American Maize Company to Portage Wholesale Company, who paid for it, $7,285.32, and then invoiced it to "Joe Blitz Corn Account" at $7,735.32. However, Portage Wholesale Company borrowed on the bill of lading, from its bank, $16,500 which it credited to Blitz Products Company and posted to Joe Blitz. The car purported to be shipped from Portage by "Blitz Products Company," consigned to the same party, "care of Joe Blitz." The bill of lading was endorsed "Blitz Products Co., c/o Krueger" in Jake's handwriting. Jake sent Joe Blitz a note listing the price at $16,500 and informing Joe that the car was to go to Simms at Lorraine, Ohio. One Samuel J. Sens of that city had ordered the car by telephone directing it be sent to Peak Products Company. Sens is also known as Jack Sens and Jack Sainnes. Sens and Morrison of Peak Products worked together on the deal, selling the car to Monarch Wine Company, who paid the draft for $16,500, drawn by Portage Wholesale Company.

Sens testified he did not know Belle; that he dealt only with Jake and Jule Marachowsky and had no transactions with Belle. His testimony of the falsity of the defendants' sworn statements was corroborated by the foregoing circumstances and others, including Belle's own previous inconsistent acts and statements, the bank records and those of Peak Products Company.

In count 13 it is averred that Belle swore falsely that one Robert Blumberg owed her $43,700 for corn which she had sold him, and that he wired the payment to her in satisfaction of the debt. Blumberg operated the Canned Meat Corporation, in New York City, and shared an office with Sol Abramson, who dealt with him in various sorts of food products. He testified that he didn't know Belle; that he bought nothing from her, did not talk to her and had no transactions with her. It seems that Blumberg had some transaction with Abramson, as a result of which he gave to the latter three checks aggregating $35,000 which Abram-

son later turned over to Jake or Belle. Later Abramson reported to Blumberg that Belle said Jake demanded more money and would not accept checks. Thereupon Abramson asked Blumberg to wire Belle $43,750 and he did so. Without prolonging the recital of evidence offered in support of this count, upon careful consideration, we are content to dispose of it with the observation that there is no direct testimony by Blumberg that he did not remit the money to Belle. What the transactions betwen Blumberg and Abramson, what, if any, the deals between Abramson and Belle and Jake, were all uncertain and conjectural; taken as a whole, the evidence is insufficient, we think, to sustain the verdict of guilty on this count.

In the 14th count, it was charged that Jake swore falsely before the referee that the invoices belatedly discovered appeared on the books and records of the company; that on December 23, 1946 he had "the sheets" before him and thought the entries were duly entered. We need not repeat the circumstances already recounted. The company bookkeepers, three in number, testified fully as to the records,—the cash receipts book, the ledger sheets, the general journal and the general ledger. In them were recorded the entries as originally made; in none of them appeared the invoices involved. No one of the witnesses had ever seen or heard of them. Indeed, an accounts receivable in Belle's name which they had seen had disappeared and had been missing ever since. Furthermore one of them, who prepared the schedules of creditors for the debtor proceedings, testified that Belle's name did not appear as a creditor anywhere in the books and that the records disclosed no debt due her. These facts, coupled with all the other evidence, made the issue on this count, a jury question.

Count 15 charged conspiracy by both to commit an offense against the United States, towit, to present and use a false claim and a false amended claim against the debtor's estate and to make false oaths in said proceedings in relation to said claims. Numerous overt acts were charged. Without further prolonging discussion of the facts, we think it clear that the evidence constituted proof sufficient to require that the questions involved in this charge against both defendants be submitted to the jury.

From the authorities previously cited, it is clear there can be no question that circumstantial evidence may legitimately constitute sufficient corroboration of a single direct witness to establish a charge of false oaths in a bankruptcy proceeding. See also *United States* v. *Hiss*, 185 F. 2d 822, 830 (CA-2); *United States* v. *Seavey*, 180 F. 2d 837 (CA-3), cert. den. 339 U. S. 979. *Radomsky* v. *U. S.*, 180 F. 2d 781 (CA-9) cited by defendants stands only for the proposition that where there is no direct testimony of a witness to the falsity charged, circumstances alone are not sufficient to sustain a conviction and distinguishes between such unsupported circumstances and documents emanating from the defendant, as was the case in *United States* v. *Wood*, 39 U. S. 430. The case is also additional authority for the proposition that documents originating with the accused are admissible. Thus Belle's inconsistent statements and claims were proper aids to the jury in its determination. Upon review of all the evidence we find no justification for defendants' insistence that the court erred in denying their respective motions for acquittal.

The court fully and carefully instructed the jury as to its duty as sole judges of the facts; the separate charges in the various counts of the indictment; the applicable statutes; the various rules pertaining to credibility; the presumption of innocence; the government's burden of proving guilt beyond all reasonable doubt; the nonevidentiary character of the indictment; what constitutes a reasonable doubt; the jury's duty to endeavor to reconcile the evidence with the presumption of innocence, if it could be done reasonably; the duty to ignore excluded evidence and arguments of counsel with regard thereto; counsel and court comments on objections; expert testimony and the limitations on its effect; the fact that no charge of violation of ceiling prices was involved; the lack of materiality of the referee's ruling on Belle's claim; the definition of false oaths; the fact that even though testimony is false, if the witness honestly believes it to be true, it is not false; willful and conscious falsity; the requirement that to convict, there must be at least one direct witness contradicting the alleged false statement, and facts and circumstances cor-

roborating the alleged falsity; direct evidence; circumstantial evidence; the requirements of the essential corrobative evidence; the duty to treat each count as a separate charge; the requirements of the rule as to each count; the essentials of proof of Count 14 against Jake and the nature of and the proof required under Count 15 charging conspiracy against both defendants. This charge, covering some thirty typewritten pages, was full, fair, impartial and complete in all essential details; it meticulously sought to protect defendants in all particulars and reflects a careful and studious attempt on the part of the trial court to safe-guard the rights of defendants and to advise the jurors fully of what was necessary to warrant a verdict of guilty.

Notwithstanding the careful comprehensiveness of the charge, defendants urge that the court erroneously advised the jury that it might convict on circumstantial evidence alone and unduly and improperly commented in its charge upon the various single witnesses who testified in support of the respective counts. Defendants' assertion that the court undid what it had done in instructing the jury of the requirement of one direct witness and corroboration thereof, in its charge concerning circumstances thereby led the jury to believe that it could convict on circumstantial evidence alone is, we think, wholly without merit. The part of the charge objected to appears in the footnote.[2] The

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[2] Sometimes circumstantial evidence is even more convincing than direct evidence, because direct evidence may depend upon the memory or observation and truth of one witness, while circumstantial evidence may be produced and depend upon the memory, observation, and truth of many witnesses who concur and agree, or upon physical facts, which cannot be mistaken and cannot speak falsely.

But to warrant your use of circumstantial evidence as a basis for finding the guilt of the defendants, or either of them, each fact necessary to the conclusion of guilt must be proven beyond a reasonable doubt; and all the facts so proven must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken altogether, must be of a conclusive nature, and producing, in effect, a reasonable and moral certainty of the fact to be established.

The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide

court had already warned the jury of the strict requirements of proof governing charges of false oaths. It gave to the jury in this respect the instruction appearing in the footnote.[3] It is clear that when the court charged the jury as indicated, it had previously defined the essentials of proof. The later charge complained of was merely manifestation of the court's desire to explain fully the characteristics of circumstances as corroboration. No one could possibly have been misled. Defendants' rights were safely guarded in this respect.

Defendants also contend that the court improperly commented on the evidence, in that it emphasized that as to each count not only must the jury believe the witness who had testified as to the falsity charged, but also that other evidence corroborated the direct testimony of falsity.[4] This, say defendants, was equivalent to saying that if the jury believe the witness and the corroborative circumstances, it should find defendants guilty. Again defendants have singled out one paragraph only, ignoring entirely the court's full exposition of the law governing what the government was bound to prove. Read as a whole,

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with and render probable the guilt of the accused. The facts so proven must be inconsistent with innocence, and incapable of explanation upon any other reasonable theory than that of guilt.

[3] The corroborative evidence must be trustworthy.

Unless the evidence meets these standards, it is not sufficient to corroborate the testimony of the single witness.

If you fail to find that, as to any count, there is both direct evidence of the falsity of the statement and corroborative evidence, then as to that count you must acquit the defendant charged in that count. This means that, as to the first fourteen counts, you must carefully consider the evidence, and look in each instance to see if there is testimony of at least one witness which you believe directly establishes the falsity of the oath, plus corroborative evidence of the nature I have just described.

[4] Typical of the various charges in this respect is the following: "Before you can find Belle Marachowsky guilty on Count 1, or find J. H. Marachowsky guilty on Count 2, you must believe beyond a reasonable doubt; First, Mr. Frank Figge's testimony that he had no transactions with Belle Marachowsky, and that she had not given money to him personally and by her agent; and, second, that there is other evidence in this case which corroborates the testimony of Mr. Figge, and proves beyond a reasonble doubt that the defendant charged in that count knowingly testified falsely with regard to this transaction."

there can not have been the slightest confusion of the jury. The trial court may comment on the evidence if it does so fairly. This the court did here. Furthermore the objections taken to these portions of the charge were not sufficient to raise the point urged. Indeed, the record shows no objection at all by Belle, and an objection of an entirely different species by Jake. As a matter of fact one reading these specific charges can conclude only that they were beneficial to defendants.

Defendants urge that the court erroneously refused to give their tendered fifth instruction, in which they asked the court to charge that certain documents introduced in evidence were presumed to have been executed on the dates they bore. There was direct testimony by defendants that the documents were fully executed on those dates, and circumstantial evidence to the contrary by the government,—the reasonable inferences from all of which were for the jury. In this situation with evidence both pro and con, the presumption became mereged with the direct issue of fact, to be determined, not by the presumption but, by the evidence pro and con. The presumption was no longer material or relevant. Inasmuch as the court had fully charged the jury of the government's burden, and this specific issue was one of fact, we find no prejudicial error in refusing this instruction.

We reach the same conclusion as to the refused sixth instruction which sought a charge that it was immaterial whether a certain contract would have been binding in a civil case. All other parts of the tendered instruction had been fully covered. This specific postulate was, we think, wholly immaterial. There was no issue as to the binding effect of the contract, if it was genuine; to have given this instruction might well have confused the jury by injecting an immaterial issue for its consideration. At any rate, the refusal to give it was, we think, entirely harmless.

Defendants' eighth and ninth instructions, refused by the court, sought to have the jury charged that it was immaterial whether the contracts and checks issued by a corporation were recorded. These instructions too, we think, tended to suggest to the jury an issue which was not pre-

sented. There was a controversy concerning the checks. The fact that they were not shown in the records of the company was a circumstance which the jury had a right to consider. Consequently, the instruction, insofar as the checks were concerned, would have been misleading. Furthermore there was no issue as to whether the contract had ever been recorded; that issue was not presented and was wholly immaterial.

By their sixteenth requested instruction, defendants sought to have the jury advised that a witness is not guilty of perjury when he swears falsely, if he believes the fact to be true, though without any reasonable cause. Apparently the objection to the refusal to give this instruction was not made within the time fixed by Rule 30 of Federal Rules of Criminal Procedure. In the absence of unusual circumstances we are not justified in considering any alleged error in such situations. *Coppersmith* v. *U. S.*, 176 F. 2d 353 (CA-4). However, on the merits, there was no prejudicial error in this respect, for the court had charged the jury that the issue as to each defendant was whether he swore to what he knew to be false, that in this respect it is not an offense if a person swears to something which he believes to be true even though such testimony is false, that it is not an offense to be mistaken, and that one must willfully and consciously swear to that which he knows is not the truth. To our mind this fully covered everything that the tendered sixteenth instruction included. Of course, it was not necessary that the exact language of tendered instructions be followed. It is enough that they have already been given in substance. *Sugarman* v. *U. S.*, 249 U. S. 182; *May* v. *U. S.*, 175 F. 2d 994 (CA-DC).

Defendants urge error in that the court admitted in evidence summaries of certain books of accounts of Portage Wholesale Company made by duly qualified auditors. The cash books, invoices, general journal and ledger were all introduced in evidence or made fully available to defendants before the conclusion of the trial, when it was still possible to cross-examine the auditors or to recall them for additional cross-examination. In this situation, the summaries were clearly admissible. Of course, the witnesses' testimony and their compilations did not cover all contents

of the records; they purported to cover only those items as to which an issue existed. There was no occasion for them to testify as to the contents of the records as to anything not in controversy.

It is insisted in behalf of Belle that the books and records of Portage Wholesale Company were inadmissible against her. It must be remembered, however, that both defendants were charged with conspiracy and that these documents were clearly admissible against Jake. If Belle desired an instruction that they were to be considered only as against Jake, she had the opportunity to request such a limitation in the charge of the court; this she failed to do. The court at great length explained to the jury the essential elements of a charge of conspiracy and of the requirements of proof sufficient to justify a verdict of guilty. If either defendant desired anything additional in that respect, the time and place to obtain it was then and there in the trial court. *Coppersmith* v. *U. S.*, 176 F. 2d 353 (CA-4).

Defendants' contention that the court improperly instructed the jury that the testimony of defendants before the referee was material to the issues under consideration by that official is without merit. Thus, in *Sinclair* v. *U. S.*, 279 U. S. 263 at 298 the court said "and the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court (citing cases) * * *. It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury." The second circuit in *Carroll* v. *U. S.*, 16 F. 2d 951 at 954 ruled likewise in these words: "But whether it was any 'material' matter was a question of law for the court and was not for the jury," citing many cases in other jurisdictions.

In further support of their contention that the court should have directed a verdict for each defendant, defendants argue at length the alleged insufficiency of the evidence. Of course, the case is not tried here *de novo*. We have nothing to do with questions of credibility or weight of controverted testimony; we may inquire only as to whether the evidence, factual and circumstantial, together with the reasonable inferences to be drawn therefrom, made out a controverted question of fact for the jury. And

in determining that issue we must necessarily consider the evidence in its phases most favorable to the government. Consequently we have carefully examined the voluminous record of parol and documentary evidence. After such consideration, we conclude that it was entirely adequate to justify a finding of the jury that defendants entered into a conspiracy to secure allowance of a fraudulent claim against the bankrupt estate; that they manufactured and presented as genuine false invoices in favor of Belle and a false pretended contract between Jake and Belle; that each swore falsely in the bankruptcy proceedings, as charged in the respective counts, in support of the fraudulent claim. Of course, it was not necessary, in order to sustain the verdict, for the jury to make such broad findings. As to the substantive counts, it was essential only that the government prove the specific false oaths charged. The evidence amply supports a finding in that respect and meets fully the strict requirements of proof necessary to warrant a conviction for making false oath, even though we adhere to the harshness of that rule, despite the evident growing reluctance on the part of many courts to do so. We think it unnecessary to prolong this discussion. We merely add that other contentions of defendants are without merit.

Finding no error in the trial, the judgments as to all counts, other than the thirteenth, must be affirmed. The judgment on that count is reversed. In all other respects the judgments are affirmed.

A true copy. Teste:

____ ____.

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit